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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 228.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES B. CONVERSE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 14, 1887.

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1 *Bond.*

United States Supreme Court.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Plaintiffs in Error,
vs.
CHARLES B. CONVERSE, Defendant in Error.

In error to the United States circuit court for the district of New Jersey.

Know all men by these presents that the Delaware, Lackawanna and Western Railroad Company, a corporation of Pennsylvania, and Edgar S. Auchincloss, of New York city, in the county of New York and State of New York, and Gardner R. Colby, of Brick Church, East Orange township, in the county of Essex and State of New Jersey, are held and firmly bound unto Charles B. Converse, of Jersey City, in the county of Hudson and State of New Jersey, in the sum of fifteen thousand dollars, to be paid to the said Charles B. Converse, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this first day of December, eighteen hundred and eighty-six.

Whereas the above-named The Delaware, Lackawanna and Western Railroad Company have prosecuted a writ of error to the
2 Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of New Jersey:

Now, therefore, the condition of this obligation is such that if the above-named The Delaware, Lackawanna and Western Railroad Company shall prosecute their said writ of error to effect and if they fail to make their plea good shall answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and virtue.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
By SAM. SLOAN, *President.*

Attest:
[L. S.] FRED. T. CHAMBERS, *Secretary.*
Witness as to M. TAYLOR PYNE. EDGAR S. AUCHINCLOSS. [L. S.]
Witness as to M. TAYLOR PYNE. GARDNER R. COLBY. [L. S.]

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I hereby certify that on the first day of December, 1886,

3 before me personally came Edgar S. Auchincloss and Gardner R. Colby, to me known and known to me to be the individuals described in and who executed the within bond, and severally acknowledged that they executed the same.

[L. S.] SAM. M. HITCHCOCK,
U. S. Comm'r, So. Dist. N. Y.

(Endorsed:) United States Supreme Court. The Delaware, Lackawanna and Western Railroad Company, pl'ffs in error, *vs.* Charles B. Converse, def't in error. On writ of error to United States circuit court for the district of New Jersey. Bond. Joseph D. Bedle, att'y of pl'ff in error. Sureties approved by Wm. Butler, judge. Filed Dec. 3, 1886. S. D. Oliphant, clerk.

4 *Affidavit of Surety.*

United States Supreme Court.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Plaintiffs in Error,
vs.
CHARLES B. CONVERSE, Defendant in Error.

In error to the United States circuit court for the district of New Jersey.

SOUTHERN DISTRICT OF NEW YORK, } ss:
State of New York, County of New York, }

Edgar S. Auchincloss, of full age, being duly sworn, on his oath saith that he is one of the sureties named in the bond given for security on the writ of error from the Supreme Court of the United States to the circuit court of the United States for the district of New Jersey in the above cause; that he resides in the city of New York, in the county of New York and State of New York, and that he is worth in real estate in his own name in the State of New Jersey, over and above all liens and encumbrances thereon, the sum of fifteen thousand dollars.

EDGAR S. AUCHINCLOSS.

Sworn and subscribed, at the city of New York, this first day of December, 1886, before me—

SAM'L M. HITCHCOCK,
U. S. Comm'r, So. Dist. N. Y.

(Endorsed:) United States Supreme Court. The Delaware, Lackawanna and Western Railroad Company, pl'ffs in error, *vs.* Charles B. Converse, def't in error. On writ of error to United States circuit court for the district of New Jersey. Affidavit of surety. Joseph D. Bedle, att'y of pl'ffs in error. Filed Dec. 3, 1886. S. D. Oliphant, clerk.

5 *Affidavit of Surety.*

United States Supreme Court.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Plaintiffs in Error,
vs.
CHARLES B. CONVERSE, Defendant in Error.

In error to the United States circuit court for the district of New Jersey.

SOUTHERN DISTRICT OF NEW YORK, } ss:
State of New York, County of New York, }

Gardner R. Colby, of full age, being duly sworn, on his oath saith that he is one of the sureties named in the bond given for security on the writ of error from the Supreme Court of the United States to the circuit court of the United States for the district of New Jersey in the above cause; that he resides in Brick Church, Orange township, in the county of Essex and State of New Jersey, and that he is worth in real estate in his own name in the State of New Jersey, over and above all liens and encumbrances thereon, the sum of fifteen thousand dollars.

GARDNER R. COLBY.

Sworn and subscribed, at the city of New York, this first day of December, 1886, before me—

SAM. M. HITCHCOCK,
[L. S.] *U. S. Commissioner, So. Dist. N. Y.*

(Endorsed:) United States Supreme Court. The Delaware, Lackawanna and Western Railroad Company, pl'ff in error, *vs.* Charles B. Converse, def't in error. On writ of error to United States circuit court for the district of New Jersey. Affidavit of surety. Joseph D. Bedle, — pl'ffs in error. Filed Dec. 3, 1886. S. D. Oliphant, clerk.

6 UNITED STATES OF AMERICA, ss:

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

The President of the United States to the judges of the circuit court of the United States for the district of New Jersey, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Charles B. Converse, plaintiff, and The Delaware, Lackawanna and Western Railroad Company, defendants, manifest error hath happened to the great damage of the said The Delaware, Lackawanna & Western Railroad Company, as by their complaint appears, we, being willing that the error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that,

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice
6½ of the said Supreme Court, the third day of December, in the year of our Lord one thousand eight hundred and eighty-six.

S. D. OLIPHANT,
Clerk of the United States Circuit Court for the District of New Jersey.

J. D. BEDLE,
Attorney of Plaintiff in Error.

Allowed by—
WM. BUTLER, *Judge.*

[Endorsed:] 6-64. Original. United States Supreme Court. The Delaware, Lackawanna and Western Railroad Company, pl'ffs in error, *vs.* Charles B. Converse, def't in error. Writ of error to the United States circuit court, district of New Jersey. Returnable second Monday in October, 1887. Joseph D. Bedle, att'y of pl'ffs in error.

7 THE UNITED STATES OF AMERICA, *ss:*

To Charles B. Converse, Esq., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, in the third circuit, wherein The Delaware, Lackawanna and Western Railroad Company are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 3rd day of December, in the year of our Lord one thousand eight hundred and eighty-six.

WM. BUTLER, *Judge.*

[Endorsed:] 6-64. United States Supreme Court. The Delaware, Lackawanna and Western Railroad Company, pl'ffs in error, *vs.* Charles B. Converse, def't in error. Surwrit of error to United States circuit court for the district of New Jersey. Citation. Joseph D. Bedle, att'y of pl'ffs in error.

8 THE UNITED STATES OF AMERICA, *ss:*

To Charles B. Converse, Esq., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, in the third circuit, wherein The Delaware, Lackawanna and Western Railroad Company are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 3rd day of December, in the year of our Lord one thousand eight hundred and eighty-six.

WM. BUTLER, *Judge.*

A true copy.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

[Endorsed:] United States Supreme Court. The Delaware, Lackawanna and Western Railroad Company, pl'ffs in error, *vs.* Charles B. Converse, def't in error. Surwrit of error to United States circuit court for the district of New Jersey. Citation. Joseph D. Bedle, att'y of pl't'ffs in error. Service of a certified copy of the citation, of which the within is a copy, also of the writ of error in above-entitled cause, acknowledged this eleventh day of December, 1886. Vredenburgh & Garretson, att'y- of Converse.

9 United States Circuit Court, District of New Jersey.

CHARLES B. CONVERSE *vs.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. } In Case. Judgment.

Vredenburgh & Garretson, attorneys.

As yet of the seventeenth day of July, in the year eighteen hundred and eighty-six.

Witness: WM. BUTLER, *Judge.*

S. D. OLIPHANT, *Clerk.*

UNITED STATES OF AMERICA, *District of New Jersey,* } *ss:*

10 NEW JERSEY, *ss:*

The State of New Jersey to our sheriff of our county of Hudson, Greeting:

We command you to summon the Delaware, Lackawanna and

Western Railroad Company to be and appear before the
[L. S.] supreme court of the State of New Jersey, to be held at Trenton, in and for said State, on the seventeenth day of July instant, to answer unto Charles B. Converse of a plea of trespass on the case, to his damage of twenty-five thousand dollars, as is said, and have you then and there this writ.

Witness Honorable Mercer Beasley, chief justice, at Trenton aforesaid, the seventh day of July, A. D. one thousand eight hundred and eighty-six.

BENJ. F. LEE, *Clerk.*

VREDENBURGH AND GARRETSON, *Att'ys.*

(Endorsed:) New Jersey supreme court. Hudson county. Charles B. Converse *vs.* The Delaware, Lackawanna and Western R. R. Co. In case. Summons. $25,000. Ret'ble July 17, A. D. 1886. Vredenburgh & Garretson, att'ys. Sheriff's fees, $2.22. Served July 8, 1886. Ferdinand Heintze, sheriff, per John Wright, under sheriff.

New Jersey Supreme Court, of the seventeenth day of July, in the year one thousand eight hundred and eighty-six.

11 HUDSON COUNTY, *ss:*

The Delaware, Lacakwanna and Western Railroad Company, the defendant in this suit, was summoned to answer unto Charles B. Converse, the plaintiff therein, of a plea of trespass on the case, and thereupon the said plaintiff, by Vredenburgh and Garretson, his attorneys, complains—

For that whereas the said defendant, before and at the time of committing the grievances hereinafter complained of, to wit, on the thirteenth day of March, in the year of our Lord one thousand eight hundred and eighty-six, was the possessor, operator, and manager of a certain railroad constructed over, upon, and across a cer- highway commonly known and called by the name of the county road, in the township of North Bergen, to wit, at Jersey City, in the county of Hudson aforesaid, and was then and there possessed of, operating, and managing certain locomotive engines propelled by steam and certain cars drawn by steam upon said railroad and over and across said public highway and upon a level therewith; and the said defendant, not regarding its duty, did then and there, by its servants and agents, so negligently manage, operate, and govern said railroad and said locomotive engines and cars, then and there propelled and drawn as aforesaid upon its said railroad and over and across said public highway, that by reason of said negligent management, operation, and government as aforesaid the said plaintiff, while
12 passing along said public highway and then and there attempting, with due care and diligence, to cross said railroad at said crossing, as he had a right to do, was struck by a certain locomotive engine and cars and was cast and thrown to the ground with great force and violence, and by reason of the premises one of said

plaintiff's arms was broken and he was otherwise greatly bruised, hurt, and wounded, and became and was sore, sick, lame, and disordered, and so remained for a long space of time, to wit, from thence hitherto, during all which time the said plaintiff suffered and underwent great pain and was hindered and prevented from transacting his lawful affairs by him to be performed, and was forced and obliged to pay, lay out, and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of one thousand dollars, in endeavoring to be cured of his said injuries, and said plaintiff's arm and shoulder have been made permanently lame and stiff, so that the same cannot now be used by said plaintiff or used in the future, and that the bones so broken have not properly united, so that the plaintiff will in the future suffer pain and suffering therefrom, and said plaintiff has been otherwise injured permanently and in such manner that his capacity to earn his livelihood has been greatly impaired. And so the said plaintiff saith he is injured and has suffered damage to the amount of twenty-five thousand dollars, and therefore he brings his suit, &c.

VREDENBURGH & GARRETSON,
Attorneys of Plaintiff.

13 (Endorsed:) New Jersey supreme ct. Charles B. Converse *vs.* The Delaware, Lackawanna and Western Railroad Company. In case. *Narr.* Vredenburgh & Garretson, att'ys. To The Delaware, Lackawanna & Western Railroad Company, the def't within named: Take notice that unless you appear & file a plea or demurrer to the within declaration within thirty days after the date of the service hereof upon you judgment will be entered against you. Vredenburgh & Garretson, att'ys. Filed July 17, 1886. Benj. F. Lee, cl'k.

New Jersey Supreme Court.

CHARLES B. CONVERSE
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. } In Case.

Service of a copy of the declaration filed in the above-entitled cause, with notice to plead in thirty days thereon endorsed, acknowledged this 17th day of July, A. D. 1886.

BEDLE, MUIRHEID AND McGEE,
Attorneys of Defendant.

(Endorsed:) N. J. supreme court. Charles B. Converse *vs.* The Delaware, Lackawanna and Western R. R. Co. In case. Acknowledgment of service of *narr.* Vredenburgh and Garretson, att'ys. Filed July 17, 1886. Benj. F. Lee, cl'k.

14 New Jersey Supreme Court.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *ads.* CHARLES B. CONVERSE. } In Case. Pleas.

And the said defendants, by Bedle, Muirheid and McGee, their attorneys, come and defend the wrong and injury when, &c., and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them or any part thereof in manner and form as the said plaintiff hath above thereof complained against them, and of this they, the said defendants, put themselves upon the country, &c.

BEDLE, MUIRHEID & McGEE,
Attorney of Defendants.

STATE OF NEW YORK, *City and County of New York,* } ss.:

E. A. Holden, of full age, being duly sworn according to law, on his oath saith that he is the second vice-president of The Delaware, Lackawanna and Western Railroad Company, the defendants within named; that the plea by the defendants therein pleaded is not intended for the purpose of delay, and that this deponent verily
15 believes that said defendants have a just and legal defense to said action on the merits of the case.

E. R. HOLDEN.

Sworn to and subscribed, at the city, county, and State of New York, this 30 day of July, A. D. 1886, before me, a notary public in and for the city of New York, county and State aforesaid, duly commissioned and sworn.

LUDWIG A. MILLER,
[L. S.] *Notary Public, Appointed from Kings County.*

Certificate filed in New York.

(Endorsed:) New Jersey supreme c't. The Delaware, Lackawanna and Western Railroad Company *ads.* Charles B. Converse. In case. Plea. Bedle, Muirheid & McGee, def'ts' att'ys. Filed Aug. 14, 1886. Benj. F. Lee, cl'k.

And the plaintiff doth the like.

New Jersey Supreme Court.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendants, *ads.* CHARLES B. CONVERSE, Plaintiff. } In Case.

16

Petition of removal to the circuit court of the United States for the district of New Jersey.

To the honorable supreme court of New Jersey:

Your petitioners, The Delaware, Lackawanna and Western Railroad Company, the defendants in the above cause, respectfully show—

That the above-entitled suit is now pending in the above-entitled court, & is a suit of a civil nature at law.

That the matter of dispute therein exceeds, exclusive of cost, the sum or value of five hundred dollars.

That the controversy therein is between citizens of different States.

That your petitioners were at the time of the commencement of said suit and still are citizens of the State of Pennsylvania, and the plaintiff, Charles B. Converse, was at the time of the commencement of this suit and still is a citizen of the State of New Jersey.

That the venue in said cause is laid in the county of Hudson, and that the term of the circuit court of the said county of Hudson (which is the circuit to which said cause is sent down to be tried) at which said cause could first be tried has not elapsed, and that the term of this court at which said cause could first be tried has not elapsed, and said cause has not yet been tried.

And your petitioners have made and herewith file a bond, with good and sufficient surety, for their entering in said circuit

17 court of the United States for the district of New Jersey on the first day of its next session a copy of the record in said suit and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that such suit was wrongfully or improperly removed thereto.

Your petitioners further show that special bail was not originally requisite in said suit.

Wherefore your petitioners pray the court to accept said petition and bond and proceed no further in said suit.

And your petitioners will ever pray, &c.

Dated September 17th, 1886.

BEDLE, MUIRHEID & McGEE,
Attorneys of Petitioners.

STATE OF NEW YORK, }
City & County of New York. }

E. R. Holden, of full age, being duly sworn according to law, on his oath saith that he is the second vice-president of the Delaware, Lackawanna and Western Railroad Company, the petitioners within named, and that the statements made in the foregoing petition are true as he verily believes.

E. R. HOLDEN.

Sworn and subscribed, at the city, county, and State of New York, this 10th day of September, A. D. 1886, before me, a commis-
18 sioner of deeds for New Jersey in and for said city, county, and State, duly commissioned and sworn.

[L. S.] JNO. A. HILLERY,
A Commissioner of Deeds for New Jersey in New York.

(Endorsed:) New Jersey supreme court. The Delaware, Lackawanna & Western Railroad Company *a.* Charles B. Converse. In case. Petition of removal. Bedle, Muirheid & McGee, def't's att'ys. The within petition presented to me & accepted this 11th day of September, A. D. 1886, in open court. M. M. Knapp, J. S. C. Filed Sept. 11, 1886. Benj. F. Lee, cl'k.

New Jersey Supreme Court.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *ads.* CHARLES B. CONVERSE.	In Case. Bond on Removal.

Know all men by these presents that we, the Delaware,
19 Lackawanna and Western Railroad Company, a corporation of the State of Pennsylvania, as principal, and Benjamin A. Hegeman, of North Plainfield, New Jersey, surety, are held and firmly bound unto Charles B. Converse in the sum of one thousand dollars, lawful money of the United States of America, to be paid to the said Charles B. Converse, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our and each of our successors, heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the tenth day of September, A. D. eighteen hundred and eighty-six.

The condition of the above obligation is as follows: Whereas the Delaware, Lackawanna and Western Railroad Company have petitioned the supreme court of the State of New Jersey for the removal of a certain cause therein pending, wherein said Charles B. Converse is plaintiff and the said The Delaware, Lackawanna and Western Railroad Company are defendants, to the circuit court of the United States for the district of New Jersey:

Now, therefore, if the said The Delaware, Lackawanna and Western Railroad Company shall enter in the said circuit court of the United States for the district of New Jersey on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was
20 wrongfully or improperly removed thereto, then this obligation to be void; otherwise to be and remain in full force and virtue.

In witness whereof the said The Delaware, Lackawanna and Western Railroad Company have caused their corporate seal to be hereto set and these presents to be signed by their 2nd vice-president and

attested by their secretary, and the said B. A. Hegeman hath hereto set his hand and seal the day and year first above written.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,

[L. S.] By E. R. HOLDEN, *Second Vice-President.*

Attest: FRED. F. CHAMBERS, *Secretary.*

B. A. HEGEMAN. [L. S.]

Witness as to seal of surety:
M. TAYLOR PYNE.

(Endorsed:) New Jersey supreme court. The Delaware, Lackawanna & Western Railroad Company *a.* Charles B. Converse. In case. Bond on removal. Bedle, Muirheid & McGee, def'ts' att'ys.
21 September 11, 1886, this bond presented to me in open court, & approved and accepted. M. M. Knapp, judge, J. S. C. Filed Sept. 11, 1886. Benj. F. Lee, cl'k.

New Jersey Supreme Court.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY *ads.* CHARLES B. CONVERSE. } In Case. Justification of Surety.

STATE OF NEW YORK, *City & County of New York,* } *ss:*

B. A. Hegeman, of full age, being duly sworn according to law, on his oath saith: I am the person who this day signed as surety a bond in the above-entitled cause on removal into the United States circuit court for the district of New Jersey in the penal sum of one thousand dollars.

I reside at North Plainfield, New Jersey. I own real estate in New Jersey worth, over and above all my just debts and liabilities, in excess of two thousand dollars.

B. A. HEGEMAN.

Sworn to and subscribed, at the city, county, and State of New York, before me, this 10th day of September, A. D. 1886, a commissioner of deeds for New Jersey, duly commissioned and sworn.

JNO. A. HILLERY,

[L. S.] *A Commissioner of Deeds for New Jersey in New York.*

22 (Endorsed:) New Jersey supreme c't. The Delaware, Lackawanna & Western Railroad Company *a.* Charles B. Converse. In case. Justification of surety. Bedle, Muirheid & McGee, def'ts' att'ys. Filed Sept. 11, 1886. Benj. F. Lee, cl'k.

I, Benj. F. Lee, clerk of the supreme court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in above-stated cause as the same remains on file in my office.

In testimony whereof I have hereto set my hand and the seal of said court, at Trenton, this thirteenth day of September, A. D. eighteen hundred and eighty-six.

[L. S.]

BENJ. F. LEE, *Clk.*

(Endorsed:) New Jersey supreme c't. Charles B. Converse *vs.* The Delaware, Lackawanna and Western Railroad Company. In case. Copy of papers. Vredenburgh and Garretson, att'ys. Filed Sept. 28, 1886. S. D. Oliphant, clerk.

23 Afterwards—that is to say, on the twenty-fifth day of October, in the year eighteen hundred and eighty-six, in the term of September, 1886—before the said circuit court, at Trenton, in said district, comes as well the said plaintiff as the said defendant, by their respective attorneys within mentioned; and the jurors of the jury between the parties aforesaid, in the plea aforesaid, being also summoned, come, who, to speak the truth of the matters and things within contained, being chosen, tried, and sworn, and the trial having been continued from day to day until the twenty-ninth day of October, eighteen hundred and eighty-six, say upon their oath that the said defendant is guilty of the premises within laid to its charge in manner and form as the said plaintiff has within complained against it, and they assess the damages of the said plaintiff by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, to fourteen thousand dollars, and for those costs and charges to one hundred and fifty-six dollars and forty-six cents; and the court being of opinion that the aforesaid verdict is excessive, and that said verdict should be set aside and a new trial be had unless the plaintiff remit the sum of six thousand five hundred dollars of said verdict, and the said plaintiff having
24 remitted the said sum of six thousand five hundred dollars and accepted the sum of seven thousand five hundred dollars as said verdict—

Therefore it is considered that the said Charles B. Converse, plaintiff, do recover against the said The Delaware, Lackawanna and Western Railroad Company, defendant, his damages aforesaid, in form aforesaid assessed, to the sum of seven thousand five hundred dollars, and also one hundred and fifty-six dollars and forty-six cents for his costs and charges by the court now here adjudged to the said plaintiff and with his assent; which said damages, costs, and charges in the whole amount to seven thousand six hundred and fifty-six dollars and forty-six cents.

And the defendant in mercy.

Judgment signed November 24, 1886.

WM. BUTLER, *Judge.*

25 United States Circuit Court, District of New Jersey.

CHARLES B. CONVERSE, Plaintiff,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendants. } In Case.

The jury having rendered a verdict in the above-entitled cause in favor of the plaintiff and against the defendants, and having assessed the plaintiff's damages at fourteen thousand dollars—

It is ordered that the plaintiff show cause, on Tuesday, the ninth day of November, eighteen hundred and eighty-six, before this court, at the United States court-rooms, in the city of Trenton, New Jersey, at ten o'clock in the morning, or as soon thereafter as counsel can be heard, why the said verdict should not be set aside and a new trial ordered, the defendants reserving all their exceptions, leave to that effect being hereby granted, and the argument of said rule to take place upon all matters not covered by the bills of exceptions.

Rule taken in open court October 29, 1886, and entered October 29, 1886, on motion of Bedle, Muirheid & McGee, att'ys for and of counsel with defendants.

(Endorsed:) United States circuit court, district of New Jersey. Charles B. Converse, pl'ff, *vs.* The Delaware, Lackawanna and Western Railroad Company, def't. In case. Rule. Bedle, Muirheid & McGee, att'ys for & of counsel with def't. Entered October 29, 1886. S. D. Oliphant, clerk.

26 United States Circuit Court, District of New Jersey.

CHARLES B. CONVERSE
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. } Case.

I do not find anything that calls for interference with the verdict except its extravagance in amount. That it is extravagant and to such a degree as warrants a belief that improper considerations *interfered* the jury is scarcely open to controversy. It must, therefore, be set aside unless the plaintiff will consent to a reduction. The sum of seven to eight thousand dollars would certainly, I believe, be a full and ample compensation for all injury proved. If, therefore, the plaintiff will file a release of all above seven thousand five hundred dollars within twenty days after notice to his counsel of this order the verdict may stand for that sum ($7,500) and judgment be entered accordingly; otherwise, on the expiration of the time designated and proof of such notice to counsel being filed, the clerk is ordered to mark the rule for a new trial absolute.

WM. BUTLER, *Judge.*

(Endorsed:) United States circuit court, district of New Jersey. Converse *vs.* The Delaware, Lackawanna and Western Railroad Co. Opinion on rule for new trial. Filed November 18, 1886. S. D. Oliphant, clerk.

27 United States Circuit Court, District of New Jersey.

CHARLES B. CONVERSE
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. } Case.

An opinion having been filed in this court, on the rule to show cause why the verdict in this cause should not be set aside, to the effect that if the plaintiff will file a release of all above seven thousand five hundred dollars within twenty days after notice to his counsel the verdict may stand for that sum of seven thousand five hundred dollars, and the plaintiff being willing that the verdict shall stand for said sum of seven thousand five hundred dollars and no more—

It is now, on this twenty-second day of November, A. D. 1886, consented by the plaintiff that the verdict shall stand for seven thousand five hundred dollars, and that the judgment be entered accordingly; and he hereby for that purpose agrees that the verdict be entered as if it had been rendered for said sum of seven thousand five hundred dollars. The amount of the verdict above that sum is for that purpose released.

VREDENBURGH & GARRETSON,
Attorneys of the Plaintiff.

(Endorsed:) United States circuit court, district of New Jersey. Charles B. Converse *vs.* The Delaware, Lackawanna and Western Railroad Company. Consent. Filed Nov. 24, 1886. S. D. Oliphant, clerk.

28 United States Circuit Court, District of New Jersey.

CHARLES B. CONVERSE
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY. } In Case. Bill of Exceptions.

Before Judge Butler and a jury.

Messrs. Vredenburgh & Garretson, for plaintiff; Messrs. Bedle, Muirheid and McGee, for defendants.

On this twenty-sixth day of October, eighteen hundred and eighty-six, as yet of the September term, the plaintiff moved this cause for trial; whereupon a jury was empanelled and proceedings had as follows:

NICHOLAS E. WORTENDYKE, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. VREDENBURGH:

Q. What is your business?
A. I am surveyor in Hudson county.
Q. And you have been such surveyor how long?
A. I have been in the business since 1876.
Q. And did you make this map?
A. Yes, sir.
Q. How was it made—from actual survey?
A. Actual survey.

29 Q. Well, now, will you please explain it to us. What do you mean by these several colored lines running the whole length of the map?
A. They are tracks; railroad tracks.

By the COURT:

Q. Tell us what it shows.
A. Well, it shows the main tracks and sidings at the railroad crossing at Secaucus station.
Q. These black lines in the form of a building, marked "Secaucus station," what do they mean?
A. They mean the station or depot. It is a frame building.
Q. The black lines marked "crossing" represent what?
A. The crossing.
Q. Now, on what scale is this map?
A. It is on a scale of ten feet to the inch.
Q. And about when was it made? I see you have got marked on here "May 18th, 1886."
A. That was the time the survey was made, and I made the map the same time.
Q. On this side of the roadway there is a little house marked "guard-house." What do you mean by that?
A. It is a little house there. I suppose it was intended for a guard-house. I don't know whether it really is or not.
Q. Has that anything to do with the railroad?
A. No, sir; that is on the county farm.
Q. You have marked county farm as indicating—that is, the county farm?
A. Yes, sir.

30 Q. Now, just in the middle of this map, in the center of this map, there is a little break in all the railroad lines running the length of the map?
A. Yes, sir.
Q. What is the meaning of that?
A. Well, I had to cut that off so as to reduce the size of the map. There was 455 feet cut off there. I had to cut that out so as to reduce the size, or else it would make such a long map.
Q. Then the meaning of that is there are 450 (interrupted)——
A. 455 feet in between that break there.

Q. Now, you represent various sidings—various lines running into the main lines and branch lines?

A. Yes, sir.

Q. What do those represent?

A. They represent sidings. I think they are called switches.

Cross-examined by Mr. McGEE:

Q. Had you ever been to Secaucus before?

A. Yes, sir.

Q. You are familiar with the locality?

A. Yes, sir; I have been there once before.

Q. This country all about here, is it level or hilly?

A. Well, it is mostly meadow.

Q. This road runs to the county farm, doesn't it?

A. Yes, sir.

Q. Running in the direction which is towards the floor as the map now hangs?

A. Yes, sir.

31 Q. And as you leave the railroad does the ground slope downward or does it rise?

A. It rises gradually.

Q. Gradually rises up to the county farm or poor-house?

A. Yes, sir.

Q. How far is the poor-house from that crossing?

A. I could not say.

Q. Well, it is about a quarter of a mile, isn't it?

A. I suppose it is about a quarter of a mile; perhaps more than that.

Q. With a pretty gradual rise as you go towards the poor-house?

A. Yes, sir.

Q. That road is macadamized, isn't it?

A. Yes, sir.

Q. And about how wide is it?

A. Well, it is about—the roadway (interrupted)——

Q. The macadamized part, about thirty feet?

A. I think it ranges from about 25—it varies a little—about 25 to 30 feet in width.

Q. And on each side of the macadamized part there is a part of the road seven or eight feet wider?

A. For a pathway.

Q. On each side? I don't mean it is made passable, but from fence to fence.

A. There is no fence there.

32 Q. Then, as I understand you, there is a macadamized road about 25 to 30 feet, and on the west there is a pathway about ten feet wide?

A. I should suppose about ten feet.

Q. And no fence on either side?

A. No fence.

Q. As you come up to the railroad—as you get near the railroad—isn't there a gateway?

A. There was a gateway; there are no gates there.
Q. I mean a gateway.
A. There is a gateway.
Q. The arch around that gate. Is that gone too?
A. That is gone, I believe.
Q. So there is nothing there now but the road?
A. No, sir.
Q. Now, is the main track elevated a little above the surrounding country a foot or two?
A. Elevated?
Q. Yes; isn't the road on a little bank at that point?
A. No, sir.
Q. Isn't there a slight bank there?
A. No, sir; well, the siding on the west side of the road is a little more elevated than the road-bed of the main track.
Q. That is to say, the siding and the roadway are each about level?
A. No; the sidings are a little higher than the roadway of the main track.
Q. Two or three inches?
33 A. Probably about five inches.
Q. Then it is pretty nearly level?
A. It is a straight grade.

By (Mr. BEDLE:)

Q. What do you mean by the west side—siding on the west side?
A. This side towards the floor.
Q. Towards the county farm?
A. Yes, sir.
Q. Now, there is no siding there except such as is shown on your map?
A. Well, there is a coal bunker. I suppose you would call it about 157 feet north of the north line of the depot.
Q. Up here somewheres (indicating)?
A. No; towards the floor, 157 feet up.
Q. Here (indicating)?
A. No; this way, towards you.
Q. This way?
A. Yes, sir; at the end of that track.
Q. Down here somewhere?
A. Yes, sir.
Q. Now, that is the only building not shown on your map?
A. No; there is another building there, I think, a tool-house, a dilapidated old shanty.
Q. Where is that?
A. That lies a little further north.

(By the COURT:)

Q. What distance is that from the public highway, the end of the track where you say the small buildings are?

34 A. To the end of the track where the coal bunker is is 157 feet from the north end of the depot.

Q. But they are beyond where you show on your map, are they?

A. Yes, sir; I could not get it all on account of the scale being so large.

Q. This road is a good road across the tracks?

A. A very good road. I should think about the same as ordinary crossings.

Q. And this station—is there a platform around there?

A. There is a platform around the station, yes, sir; that represents the main building; the platform isn't on there.

Q. The platform is around the edge here?

A. Yes, sir.

By Mr. BEDLE:

Q. When you speak of meadows you speak of salt meadows, don't you?

A. Yes, sir; salt meadows.

Q. How many thousands of acres are there in salt meadows through which the road passes?

A. I could not say sir.

Further direct:

Q. The meadows there are two or three miles wide, are they not?

A. I should say they were.

Q. And twelve or fifteen miles long or more?

A. I could not say.

35 Q. It is meadow all along there for miles?

A. Yes, sir.

Q. Here where the county farm is situated, what kind of mountain or hill is that on?

A. Right near the gate there is pretty good ground—rather high ground.

Q. Is it a mound that rises up from the swamp?

A. Yes, sir.

Q. What is it called—what is the name of the place?

A. I have always known it as the county farm.

Q. Well, Snake Hill, isn't it?

A. Snake Hill; yes, sir.

Q. You see it from the Pennsylvania road as you look out of the left-hand windows going towards New York?

A. Yes, sir.

Q. It is the prominent landmark rising up out of the meadows in that neighborhood?

A. Yes, sir.

Q. How far is it—standing at the crossing and looking off towards the west along the railroad track—how far is it before you get across the meadows and come to high ground—a mile or two?

A. Oh, it is over a mile; yes, sir.

CHARLES B. CONVERSE, the plaintiff, having been duly sworn in his own behalf, testified as follows:

Direct examination by Mr. VREDENBURGH:

Q. Where do you live?

A. I live in Jersey City.

36 Q. And your business is what?

A. I am a physician.

Q. And you have been—you have lived in Jersey City how long?

A. About 15 years.

Q. And how long have you practiced as a physician?

A. All that time—15 years.

Q. Do you occupy any official position there?

A. Yes, sir.

Q. What is it?

A. I am county physician of Hudson county.

Q. And you have been county physician of Hudson county for how long?

A. About ten years.

Q. Do you ever go to the county institutions?

A. I do; frequently.

Q. For what reason—what is the cause of it—does your duty take you there?

A. It is part of my duty to go there.

Q. Now, do you remember being injured by the cars of the Delaware, Lackawanna and Western Railroad Company?

A. I do.

Q. When was that?

A. It was on the 13th of March, 1886.

Q. The 13th day of March this year?

A. Yes, sir.

Q. And what time in the day was it about?

A. About ten minutes after 8 o'clock in the evening.

37 Q. Will you please state where the accident occurred and how it occurred?

A. It occurred at the crossing of the county road and the Delaware, Lackawanna & Western railroad, Boonton Branch. It occurred this way: I was returning to Jersey City from the penitentiary at Snake Hill. When I reached the limits of the county farm there was a train just arriving at the crossing. I waited for that train to pass and saw that it consisted of an engine and three or four cars—I can't state the exact number, something like that—and that on the rear car there were lights. I listened and heard nothing, looked to right and left and saw nothing approaching. I started to cross and when I reached the east-bound track of the crossing I was struck by cars that were coming along without any engine attached, apparently a detached part of the train that had just preceded.

Q. Was this detached part of the train on the same track as the train that had just passed you had been?

A. It was; yes, sir.

Q. Where did the train—how were you, walking or driving, Doctor?

A. I was driving.

Q. How many horses?

A. One horse.

Q. What sort of a wagon had you?

A. What is called a lady's phæton.

Q. Well, does that—can you tell us what that is? Has it
38 more than two wheels?

A. It has four wheels. It is a top buggy, with four wheels, rather light.

Q. Now, where did the train hit you or hit the wagon you were riding in?

A. Where did it hit it?

Q. Yes; where did it hit—hit the horse or wagon?

A. It hit the wagon, I should think, about as near the center of symmetry as possible. I should think right between the two wheels.

Q. And what was the result of the blow?

A. The result to the wagon?

Q. Yes.

A. The wagon was completely demolished.

Q. And what became of you?

A. I was found in the remains of the wagon, among the pieces of the wagon.

Q. How far were you from the place where you were hit?

A. That I have no knowledge of excepting from what I have been told. I don't know what the distance was.

Q. The result to you personally was what?

A. A fracture of my left arm—compound fracture—perhaps an inch above the elbow joint; a fracture of the left collar-bone at about the junction of the outer and middle third, about there (indicating).

Q. What do you mean by the "third?"

A. Third of its length.

Q. Were you unconscious?

39 A. No, sir.

Q. At any time?

A. No, sir; I was not.

Q. Well, after the blow what is your first recollection of what was going on or what you saw?

A. My recollection is of the whole train passing above me.

Q. Passing above you?

A. Passing above me; yes, sir; passing over me.

Q. Did you feel any part of the train hit you; if so, what part?

A. I don't know as to that. I felt that I was hit with something by almost every car that passed. I suppose it was the top of my own buggy, the bows of it being struck one after the other and striking me.

Q. To return to the time when you were hit. How fast were you going at the time when you were hit?

A. I should think about three or four miles an hour.

Q. How far was the train from you—the train that hit you—when you first saw it?

A. I should hardly think it was more than ten feet when I first saw it. I was on the track when I saw it coming straight upon me to the left.

Q. As you approached this crossing did you keep at the same speed that you had been going?

A. No, sir; I slowed my speed.

Q. At what point did you slow your speed before you came to the tracks; how far?

40 A. Well, just beyond what is called the guard-house, at the county farm—between the guard-house and (interrupted)——

By the COURT:

Q. How far from the railroad?

A. That I don't know, sir. I should think something like 50 feet.

Further direct:

Q. Now, the road from that 50 feet to the rail is at what—is it level or is it at an incline; and, if so, what incline?

A. It inclines very slightly, indeed; perhaps—I don't know the rise from the railroad to the guard house; is very slight, indeed.

By the COURT:

Q. Which way does it rise from the railroad?

A. From the railroad toward the county farm very slightly.

Further direct:

Q. Doctor, did you happen to notice whether there were any cars standing in that neighborhood?

A. There were a very large number of cars standing in the neighborhood.

Q. Were there any standing on the first track?

A. There were.

Q. I refer to the track (interrupted)——

A. The track nearest the county farm?

Q. I refer to the track nearest the county farm.

A. There were cars standing on the track nearest the county farm.

41 Q. What kind of cars were they?

A. Large coal cars with coal piled upon them.

Q. How near do you think those cars, the nearest of those cars, were to the highway at this crossing?

A. Why, I think they came to the very edge of the highway.

Q. How near were the cars together; was there any space between the cars?

A. No, sir; the cars were in contact with each other, apparently.

Q. Now, the next track, being the second track from the county institutions, were there any cars on those tracks?

A. There were a large number of cars on that track.

Q. And how near did those cars come to the crossing?

A. Within a few feet; I don't know how many feet; very near the crossing.

Q. Was there anybody on the—did you see any—are there any gates there put up by the railroad, any guard gates?

A. No, sir.

Q. Was there any flagman or man with a light on that crossing at that time?

A. I saw nobody on the crossing at that time.

Q. Did the train that hit you ring any bell or blow any whistle or give any other signal of its approach?

A. No, sir.

Q. Was there any one on that train at the end that hit you?

A. I saw nobody on it.

Q. Was there any light on that end?

A. No, sir.

42 Q. What sort of a night was it, Doctor?

A. It was dark.

Q. Do you know whether it was cloudy or not?

A. It was cloudy in the west.

Q. Now, Doctor, do you know who the first man was who got to you?

A. I don't know, sir. It was somebody apparently connected with the railroad.

Q. And what did he do?

A. He came to me with a lantern some few minutes after the train had passed and asked me if I was hurt.

Q. Did he assist you up?

A. He did; yes, sir.

Q. And where did you and he then go?

A. Walked first towards the county farm and then walked back?

Q. You did?

A. With him; yes, sir.

Q. How far did you go toward the county farm?

A. Just within the gateway of the county farm.

Q. And which way did he go then?

A. Back with me to the space between the tracks, the space where the station stands.

Q. And which way did he go after that?

A. I don't remember. I think he went to find somebody connected with the county institutions.

Q. Did any one—what became of—did you see what became of the horse?

43 A. I did not know at that time what became of the horse.

Q. Did any one go after the horse?

A. I spoke to the man who came to me first, asking him to look for the horse. I think he did.

Q. Now, Doctor, was there anything—did you receive any notice or call of any sort when you were crossing that crossing?

A. I am not aware that I received any notice whatever.

Q. Did you hear anybody shout to you?

A. I remember after getting on the track hearing a voice, apparently from my left, say, "Look out!"

Q. Apparently from your left?

A. Yes, sir.

Q. Saying, "Look out?"

A. "Look out."

Q. Was there anything more said than that?

A. I didn't hear a word; and that did not seem to be addressed to me. I did not think it was addressed to me. I supposed it was one railroad man behind the station speaking to another, which frequently happens.

Q. Now, what are the tracks used for to the north and west of this crossing?

A. North and west?

Q. Yes; north of this crossing.

A. Towards the Hackensack river?

Q. Yes; those switches and side tracks. What were they used for at that time?

A. Used for coal cars and freight cars to stand upon.

44 Q. Now, Doctor, after your injury—after you got to the station—what was then done with you or what did you do?

A. After I got to the railroad station?

Q. Yes, sir.

A. I sat down upon a bench in the railroad station, and some of the people from the penitentiary came to me.

Q. And you were taken where?

A. After awhile a wagon was brought, and I was taken to my friends in Jersey City.

Q. And what then? How long were you confined to your bed?

A. Confined to my bed four weeks and to the house two weeks longer, except that I went out once, on the 13th of April—just 31 days after it happened.

Q. The compound fracture of the arm, Doctor, what was the result from that?

A. What was the result?

Q. Yes. Has it healed, or what?

A. It has healed; yes, sir. The motion is not quite as good as it was before, and the arm is not as strong as it was before.

Q. The shoulder-blade, was it on the same side as the break in the arm?

A. It was the collar-bone, and not the shoulder-blade.

Q. I mean the collar-bone.

A. The collar-bone was broken; yes, sir.

Q. Having the arm broken at that point, was it possible to set them both?

Objected to as leading.

45 Q. What was the result of having both broken on that side in the setting of the arm?

A. The result was that the collar-bone has untied in such a way that one end rides off the other a little.

Q. Is there any deformity there?

A. There is deformity there; yes, sir.

Q. Now, Doctor, how high can you raise that arm?

A. The left?

Q. Yes.

A. (Witness illustrated.)

Q. How high can you raise it this way (bending at the elbow)?

A. I can raise it up to an angle of 120° perhaps.

Q. Will you ever be able to raise that arm any better than you do now?

A. That I can't say. I don't expect to be able to raise it as well as the other side or as well as I could before.

Q. How does that affect you, Doctor, in the way of pain in the hand, and why, if you can explain it as a physician?

A. I have a numbness and tingling sensation of the third and fourth fingers of the left hand.

Q. Can you explain why that is? Does it continue?

A. It is a continuous unpleasant sensation.

Q. What is the cause of that?

A. The cause of it is, I suppose, irritation of the ulnar nerve as it passes over the fractured place.

Q. When a person received a blow on the elbow and received that pain called a pain from the funny bone, what is the
46 cause of the pain?

A. It is due to injury of the ulnar nerve, the same nerve I spoke of.

Q. And how near does that nerve pass to where this compound fracture was?

A. It seems to me that it must pass right at the very point where the pain was.

Q. That nerve is a nerve of sensation?

A. A nerve of both sensation and motion.

Q. Where does that nerve extend?

A. It gives off branches as it passes down the arm and distributes its ultimate branches to the last two fingers of the hand—the little finger and ring finger.

Q. Now, Doctor, this—going to the injury to your collar-bone—are you capable now of lifting any weight with your left hand and arm?

A. I can't lift any considerable weight.

Q. Will you ever be able to lift any weight?

A. I don't expect ever to be able to lift any considerable weight with the left hand.

Q. How does that affect you in your practice—the practice of your profession?

A. It has an injurious effect upon me.

Q. In what way?

Objected to as irrelevant. Objection overruled. Exception taken.

47 A. There are occasions in my profession where a person requires the use of both hands; requires sometimes to exercise considerable force with both hands. I have less force and less power to use my left hand than I had before.

Q. Have you any particular branch of the profession which you practice, Doctor?

A. No, sir.

Q. Are you a surgeon?

A. I am a general practitioner and surgeon.

Q. Does this injury to the collar-bone require you to wear any pad or anything of that sort?

A. Most of the time I wear a pad of cotton and wool.

Q. Why is that?

A. Because the pressure of my clothing against this sharp-pointed bone pains me.

Q. Is there a swelling or protuberance there at that point?

A. There is a projection or prominence.

Q. Does the place where these bones were broken pain you at all, Doctor, now?

A. I frequently feel pain there.

Q. How does the weather effect it? Any effect from the changes in the weather?

A. I am not certain as to that now. I think I have observed that it is more apt to be painful in damp and cold weather than in warm weather.

Q. What became of the wagon? Was it so broken that you could mend it?

48 A. I don't know what became of the wagon. It was so broken that it could not be mended. The last I saw of the pieces they were under the wagon shed at the Hudson county penitentiary.

Q. Was what remained of the wagon of any value whatever?

A. Not at all.

Q. What wagon was it—whose wagon was it?

A. Mine.

Q. How long had you bought it before this accident?

A. I had had it about two or three years. I don't remember exactly when I did get it.

Q. Did you buy it new?

A. I did.

Q. How much did you give for it?

Mr. BEDLE: What was it worth at that time?

A. I gave $250 for it.

Q. And had you the use of it; had it been (interrupted) ——

By the COURT:

Q. How long had you had it?

A. 2 or 3 years.

Q. And used it constantly?

A. I used it every day. I think it was worth about $150 when it was broken.

(Further direct:)

Q. The harness, was that broken to any extent?
A. No, sir—that is to say, no extent worth mentioning.
Q. And the horse, was that hurt?
A. The horse received slight injuries.
Q. Whose horse was that?
49 A. It belonged to Mr. McCabe, of Jersey City—Richard A. McCabe.
Q. And to what extent was the horse injured?

Objected to as irrelevant.

Q. To what extent was the horse injured? Did you have to pay for it?
A. I did; I paid for damages for the horse.
Q. How much did you pay?
A. I paid 20 dollars.
Q. Your physician's bill while you were—were you attended by physicians?
A. I was.
Q. Who attended you?
A. Dr. F——, Dr. Morris, Dr. Cane.
Q. And what were those services which they gave to you worth?

Objected to.

By the COURT: That would not be the question—what did he pay, what did they charge him, what did he owe. If there were any services gratis he could not charge for that.

Q. What did you pay for the services of your physicians?
A. Nothing, sir.
Q. Have they sent in their bill?
A. No, sir.
Q. Do you know whether they have any bill against you?
A. I don't know whether they have any bill against me or not.
Q. You were nursed where?
A. At the house of Orestes Cleveland, in Jersey City.
50 Q. By whom?
A. Principally by my sister.
Q. Your sister is the wife of Mr. Cleveland?
A. No, sir; she is not.
Q. I thought she was.
A. No, sir.
Q. Your sister was at the same house?
A. Yes, sir; she was.
Q. Does she live at that house?
A. She does.
Q. And she attended you. Have you paid her anything for her services?
A. No, sir.

Q. What was your revenue? Were you under a salary at that time?
A. I was; yes, sir.
Q. What was your salary?
A. My salary was not stopped.
Q. How much was it?
A. It was $4,000 a year.
Q. And not stopped?
A. No, sir.
Q. Did you have to employ any one to perform your services for you?
A. I did; yes, sir.
Q. Who did you employ?
A. I employed Dr. McLaughlin to perform part of them for me, and Dr. King very kindly performed some of them also.
51 Q. What did you pay out for those persons performing these services for you?
A. It was about 200 dollars; I don't remember distinctly.
Q. You said you were under a salary of $4,000?
A. Yes, sir.
Q. Can you tell us what you thought, at the time you were hit, of the injuries which you had received?

Objected to.

By the COURT: He can describe his terror and alarm and everything to enable us to judge what the situation was. What he thought as to the extent of his injury would not be evidence.
Q. Will you please describe to us your feeling at the time you were hit?
A. No, sir; I cannot.

Mr. VREDENBURGH: The question which I desire to ask—I don't know whether it is within your honor's ruling or not—is this: whether at the time of the injury he thought they were fatal.
By the COURT: I don't think it is evidence.

Cross-examination (by Mr. MCGEE):

Q. Doctor, how often do you go to the county institutions?
A. I generally go there once a day—once in 24 hours.
Q. And at that time did you go so often?
A. I did; yes, sir.
52 Q. What time generally—what hour in the day?
A. I generally go from about 5 to 6 in the evening.
Q. And about how long do you generally remain there?
A. Sometimes two and sometimes three hours.
Q. And this happens every night?
A. Yes, sir.
Q. You went that night about what hour?
A. I suppose I went between 6 and 7.
Q. And you remained there until you came away at 8?
A. I did; yes, sir.

Q. Did you have your supper there?

A. No, sir.

Q. You ate nothing and drank nothing there?

A. No, sir.

Q. The road from there to the county-houses rises gradually, does it?

A. I drove to the penitentiary, not to the almshouse.

Q. They are all there at that same hill?

A. The penitentiary is at the foot of the hill; I think the penitentiary stands on ground not much, if any, higher than the railroad.

Q. Then from the penitentiary to a point where you come out in front of the county buildings you come uphill, don't you?

A. Very slightly.

53 Q. Well, what I want to get at is this, Doctor, whether the road from the railroad crossing rises for a distance of some hundred yards or more—two hundred yards—as you go towards the county buildings?

A. I think not.

Q. You think it is about level?

A. I think there is a very slight rise from the railroad for the first 50 feet or thereabouts, and then it is about level. Snake hill, that the almshouse stands on, rises very abruptly from the meadow.

Q. The country about there is meadow?

A. Yes, sir.

Q. And the road is made road through the swamp?

A. Yes, sir.

Q. And it is so for two or three miles?

A. Yes, sir.

Q. And then you come to Bergen Hill, do you not?

A. What is called Jersey City heights.

Q. Well, it used to be called Bergen Hill?

A. Bergen Hill, I suppose, is the more southern part of it.

Q. Now, as you came from the county house that night—you say it was night—wasn't it a moonlight night?

A. Well, the moon, I suppose, was about 40 degrees high. The moon was in the first quarter in the west.

Q. Did you have any difficulty in seeing the outlines of the fence and other objects along the road?

A. When I started from the penitentiary the moon was shining from the west; before I reached the limits of the county grounds the moon had become obscured.

54 Q. My question was, whether you had any difficulty in seeing the outline of the fence and other objects along the road?

A. I could not see them far.

Q. Could you see them 50 or 75 feet?

A. I don't suppose I could see them more than 35 or 40 feet.

Q. Did you have any difficulty in seeing the train that passed you?

A. I could see the lights.

Q. Could not see the cars?

A. I could not see the cars between the engine and the rear car. I could see the rear car, because there were lights on it.

Q. Now, there is a freight train that comes along there about that time every night, isn't there?

A. I believe there is; at least very frequently. I don't know what their schedule is.

Q. Well, you were in the habit of seeing a train come from that direction towards New York about that hour?

A. About that hour I frequently see them; freight and coal.

Q. That was this train, wasn't it, and you knew they were in the habit of drilling at that point, didn't you?

A. I knew they had sometimes three or four engines at that point drilling.

Q. Now, this is a secluded road, isn't it—rather an unfrequented road?

A. I should not regard it so.

Q. Are you not aware that at night yourself and the em-
55 ployees belonging to the penitentiary are about the only conveyances that cross there?

A. There are other visitors that go there.

Q. At night?

A. In the evening; yes, sir.

Q. Who are they?

A. Any one who wants to.

Q. That road stops at the county buildings, doesn't it?

A. Yes, sir.

Q. It does not go on at all?

A. No, sir.

Q. It is all salt meadow around the farm except this spot of land, that hill on which the county buildings stand?

A. Yes, sir.

Q. Excepting only that side towards the railroad?

A. I suppose that might properly be called salt meadow, too. There is some ground there that is cultivated, that is true—a very small amount.

Q. Well, it is not a road that is at all frequently travelled, is it, such as we all see in ordinary country places between villages?

A. I frequently meet people as I come home who are driving towards Snake Hill and driving to Snake Hill.

Q. What do you mean by frequently?

A. I should think I met on an average about one an evening.

Q. Now, you were in a buggy?

56 A. I was; yes, sir.

Q. A fall-top buggy?

A. Yes, sir.

Q. A buggy that lets down and raises up. It is a hood?

A. Yes, sir.

Q. As you approach the road was the hood up?

A. Yes, sir.

Q. And you were wrapped up in a blanket?

A. I had a lap robe over my lap.

Q. As you went to the penitentiary that evening didn't you find a train on that same track?

A. As I went towards the penitentiary?

Q. Yes.

A. That I don't remember.

Q. Don't you remember this, that as you went towards the penitentiary there was a coal train with a caboose standing on the track, and that you, instead of waiting for it, drove around it and across the rails out of the roadway without waiting?

A. Not that night; no, sir.

Q. Didn't you frequently drive ahead of approaching trains near by?

A. Knowingly?

Q. That I don't know—but didn't you; don't you know that frequently you just get over in time not to be run over by trains?

A. No, sir; I don't know anything of the kind. I know I have escaped a train once or twice before—a narrow escape.

57 Q. Wasn't it your habit if you saw a train coming, unless it was right on the crossing, to drive quickly over ahead of it?

A. Not by any means, unless I saw the train was at a safe distance.

Q. Say two or three hundred feet?

A. No, sir; I don't call that a safe distance.

Q. Isn't it a fact that night, as you came from the penitentiary, you drove on a trot without stopping until you were struck?

A. No, sir; it is not a fact.

Q. Are you sure you came to a stop first?

A. Yes, sir.

Q. When you reached the point of the crossing had the section which passes first cleared the crossing?

A. When I reached the crossing?

Q. Yes.

A. When I reached a point from which I could see the crossing it had not.

Q. Now, how close to the crossing did you go before you stopped?

A. I should think the distance was not far from 60 feet.

Q. And there you stopped and waited?

A. Until I saw this (interrupted)——

Q. And then you drove on without looking?

A. I looked right and left, as I said before.

Q. And saw nothing?

A. Saw nothing.

58 Q. Was there any caboose at the end of the section that had passed?

A. The section that had passed, the last car seemed to be a freight car with lamps attached—lanterns behind.

Q. You say there was no caboose attached to the section that passed while you waited?

A. I say the last car was a freight car with lamps behind.

Q. Two lamps?

A. Four lamps.

Q. Was there any caboose; you know what I mean by a caboose?
A. I don't think there was a caboose.
Q. Now, did you see on the section of the car coming towards you any caboose—the section that hit you, was there any caboose, as you observed, on that?
A. I don't mean to say there was no caboose on the other end of the section that struck me, but on the end that I saw there was no caboose. I saw no caboose on that section of the train, but I don't presume to say there was no caboose on the other end. I could not see the whole length of the train, I only saw the end that struck me.
Q. Don't you know that on the other end of that train there was a light up high on the top of the car, whatever it was?
A. I have just told you I did not see the whole of that train; I only saw the end that struck me.
Q. The main track there is perfectly straight, isn't it?
A. For how long?
59 Q. Well, for several hundred feet?
A. It may be for several hundred feet; I don't know.
Q. These two lines here, as I understand it, represent the main tracks. Is that your understanding of it?
Mr. VREDENBURGH: It is marked east and west—the main tracks.
Q. This train, as I understand you, was on the right-hand or east-bound track of the two main tracks?
A. Yes; as I understand it.
Q. That is the right-hand one of the two main tracks as you go towards New York?
A. The right as you go towards New York; yes, sir; that is my understanding of it.
Q. Didn't you hear, as you came up to the crossing, a man cry out, "Hold on there, hold on there," in a loud tone of voice?
A. I did not.
Q. Didn't you hear two men cry out to that effect?
A. I did not.
Q. Now, what did you hear the man cry out?
A. I heard a voice, apparently to my left, use these words: "Look out."

(By the COURT:)

Q. Where were you then?
A. I was then among the tracks. I was on the track nearest the fence—nearest the county road.

Further cross-examined:

60 Q. Just show us on the map which you mean.
A. When I first heard the voice I was about there (indicating on the map).
Q. Now show us the point of collision—just describe it in words.
A. On the east-bound track.
Q. Which is the third one of those shown on that map, as you come from the county-house?

A. It is; yes, sir.

Q. And you were between the first and second when you heard the voice?

A. I think so; as near as I can remember.

Q. Now, that is about how far from the track on which the collision occurred?

A. I should think it was a little less than 20 feet.

Q. At what gait was your horse then going?

A. Going at the rate of about three or four miles an hour.

Q. In other words, he was trotting?

A. Slowly.

Q. And you did not stop or pay any attention to the voice?

A. That voice did not appear to be addressed to me. I did not stop—I did not dare to stop.

Q. Why not?

A. Being on the tracks already and being in as much danger from this track as the other—in fact, thinking the track that had been just cleared was the safest track of all, I went forward.

61 Q. Now, as I understand you, you stopped at about this point first (indicating)?

A. I did.

Q. And then you looked, and then you drove on at a trot without looking again after you had started?

A. I did.

Q. And when you heard the voice (interrupted)——

A. "Without looking again"—I don't understand what you mean by that.

Q. I will repeat it.

A. Without stopping to look again?

Q. Yes.

A. I did not stop looking; I was looking all the time—looking to right and left and leaning forward.

Q. Could you see with your hood up?

A. I could by leaning forward.

Q. And you did not stop again until you were struck?

A. I did not stop again.

Q. You were not driving your own horse that night?

A. I was not.

Q. What was the reason?

A. My horse was lame.

Q. And this was a horse you hired of a livery stable?

A. Yes.

Q. Had you any difficulty in managing him?

A. Not the slightest.

62 Q. Do you remember saying to Dr. King in the yard, after you were hurt, in the presence of the yard-master there—the dispatcher there—that you had a strange horse and could not manage him?

A. No, sir; I don't remember saying that. I am sure I did not say that.

Q. Do you remember saying to this man O'Brien that you heard him holloa?

A. I don't know O'Brien at all.

Q. Mr. O'Brien, will you stand up? (Mr. O'Brien arose in the court-room.) Do you remember that man?

A. I don't remember seeing him that night, sir.

Q. Well, you remember him. You don't remember seeing him that night? You don't remember saying to him that you heard him holloa?

A. I remember saying this to somebody in answer to the question, "Did you not hear me holloa?" My answer was, "I heard somebody say, Look out, but I did not know it was intended for me."

Q. Are you a single man, Doctor?

A. Yes, sir.

Q. Never been married?

A. I never have.

Q. You have no children?

A. No, sir.

Q. How far is it, Doctor, from the county farm to Bergen Hill, that you call Jersey City Heights?

A. I don't know exactly; I should think a mile and a half.

Q. You spoke about having your buggy a year and a half. Will you tell us what kind of roads there are, with the exception
63 of this one road? What is the nature of the roads in Jersey City?

The COURT: You can easily get at the value of the buggy without going so far around.

Mr. BEDLE: We will withdraw the question. It is not important.

It is admitted that the road upon which the accident occurred is operated by the Delaware, Lackawanna & Western Railroad Company.

Adjourned to Wednesday, the 27th day of October, 1886, at 9.30 a. m.

64 TRENTON, N. J., *October 27th*, 1886.

Continuation of examination pursuant to adjournment.

Appearances as heretofore.

Dr. CONVERSE.—Further examination (by Mr. BEDLE):

Q. I understand you that the point where you first stopped was toward the county institutions, Doctor?

A. Yes, sir.

Q. And that is to the west of what is indicated on the map here by two broken lines, one being at the end of what is marked "path?"

A. Yes, sir; to the west of that.

Q. How far to the west of that?

A. I don't know.

Q. About——

A. Perhaps 20 feet.

By the COURT:

Q. About how far was that from the railroad track?

A. It might be about 15 yards from the nearest railroad track.

Q. About 15 yards?

A. Somewhat about that.

Q. What is the distance across from the railroad track further west to the other furthest east? What distance is it across all the track?

65 A. The width of the whole crossing?

Q. Yes. What, in your judgment, is the distance across?

A. I should think about 120 feet.

Q. That would embrace all the tracks?

A. I should think so.

Q. Well, the map will tell us the distance between the several tracks by measurement.

A. Of course, I never measured that and I don't pretend to speak accurately.

Q. Of course, you don't.

(Mr. Vredenburgh proceeded to scale map and reported as follows: The actual distance across from the first rail on the west to the last rail on the east is 10½ inches by the scale. The map is scaled 10 feet to the inch, which would make 105 feet across.)

The COURT: Of course, two of those tracts are quite close together, but there is quite a space on the map between the other tracks. How much is that?

Mr. VREDENBURGH: From the second rail of the first track on the west to the first rail of the second track next east in the center of the road is a little less than 10 feet; in fact, just 9 feet.

The COURT: What is the distance across, embracing the whole distance covered by the track?

Mr. VREDENBURGH: 105 feeet from rail to rail; the tie might be a few feet outside of that. This distance between the second westerly track and the east track, known as the east-bound track, is a

66 trifle less than 10 feet. That is where he was struck.

The COURT: The distance from the western side of the first track to that track is how much?

Mr. VREDENBURGH: A little less than 19 feet, and the width of the track, which is four feet and eight inches, which it would make 23 feet.

(By the COURT:)

Q. About how many yards did you say it was, in your judgment, that you stopped from the first track?

A. About 15 yards.

(By Governor BEDLE):

Q. I simply ask to get the state of your mind, and that is as to the cars. You say there were cars standing to the left of you on the first and on the second tracks?

A. Yes, sir.

Q. I want to get your state of mind exactly, whether at the time you actually saw those cars standing there or not.

A. I did.

Q. How many?

A. I didn't count them; there was a vast number of them.

Q. On both tracks?

A. On both tracks; yes, sir.

Q. About how many on the first track?

A. Why, there was a long line of them; so long that I could not see the end of them.

Q. How far did you see the end of it?

A. In feet?

Q. Yes; in distance—yards.

A. To the left there were five or six cars and platform (interrupted)——

67 Q. How far did you see the end of the cars; how many yards?

A. I don't understand your question.

Q. To what extent did you see the cars on the first track—how many yards?

A. I could not see the end of them.

Q. How many yards did you see at the left?

A. Probably one hundred yards to the left?

Q. All those cars standing there?

A. Yes, sir.

Q. How many feet to the left? What cars did you see standing on the second track?

Mr. VREDENBURGH: He didn't say 100 yards to the left of the cars.

Governor BEDLE: Nobody pretends that.

Q. Now, how many yards of cars did you see standing on the second track to the left of you?

A. I don't know. I could not see the end of them. As far as I could see at all, there were cars standing.

Q. How many yards?

A. I don't pretend to say that I could see one hundred yards at that time of night.

Q. You saw one hundred yards of cars standing on the first track?

A. I don't know as I understand your question. I mean to say this: I saw cars standing there as far as I could see anything.

The COURT: The question is, How far could you see to the

68 left, in your judgment, at that time?

A. At the time I was hurt?

Q. Yes.

A. Oh, I might have seen to the left, so as to be aware of the fact that cars were standing there; perhaps about 40 yards; but I happen to know that there were cars standing (interrupted)——

(By Gov. BEDLE:)

Q. One moment. That is on the second track?

A. On the second track.

Q. On the first track, I understand you that cars were standing there to the length of 100 yards?

A. Well, as far as to the platform.

Q. You did say 100 yards, didn't you, on the first track?

(By the COURT:)

Q. Is that what you mean to say—that you saw the cars standing there to the distance of 100 yards to the left of the track?

A. I cannot be positive about that.

Q. What is your best judgment?

A. I mean this: that there were cars standing on the first track as far as I could see.

Q. Can you give us an idea of how far you could see?

A. I should think it might be 45 yards. I wish to know (interrupted)——

(By Gov. BEDLE:)

Q. Don't answer anything else, please.

Redirect (by Mr. VREDENBURGH:)

Q. What control had you of the horse that you were driving between the time that you stopped before you ran over the
69 track and the moment of the accident?

A. I had perfect control over him.

Q. At the speed at which you were going immediately preceding the accident, within what distance do you think you could have stopped?

The COURT: Do you think that is necessary? You have the other facts—that he had perfect control of his horse, and so forth.

Mr. VREDENBURGH: I will withdraw the question, your honor.

Q. I understand you to say on cross-examination that you had a lap robe over your knees?

A. I did; yes, sir.

Q. Had you anything else besides the lap robe over your knees?

A. No, sir.

The COURT: There is no suggestion that the lap robe interfered with him, and if it did he had a perfect right to carry it. It is very customary to carry a lap robe.

Q. Will you describe and show us, Doctor, in what manner you looked from that wagon for the approaching train from the time you started?

Objected to.

The COURT: You have been all over that. If you have inadvertently failed to ask him about it as fully as you think you should, you may put the question. He said he had, and I understood him to say he looked.

70 By the COURT:

Q. Now, which way did you look?
A. I looked both ways.
Q. And listened?
A. Yes, sir.

Mr. VREDENBURGH: The reason I ask that is they have gone into the question of the top buggy, and I wish to show how easy it was for this gentleman to see. It is perhaps a matter every one will know about, but I think perhaps it is as well to ask about it.

By the COURT:

Q. Had you curtains up?
A. Yes, sir; side curtains.
Q. Then answer the question.
A. I leaned forward in this manner (illustrating) and looked right and left.
Q. Looked around the front of the buggy?
A. Yes, sir.

Further redirect:

Q. Do you remember whether you did do that that night?
A. I did; yes, sir.
Q. I understood you, in answer to Gov. Bedle's question this morning, to say that cars were standing on the track to the left of you as you approached the crossing.
A. Yes, sir.
Q. The cars which hit you also came from the left of you?
A. Yes, sir.
Q. In that same connection I desire to ask you the height of the carriage you were in. I understand you to say you were in a lady's phaeton?

71 A. I was; yes, sir.
Q. What height is the seat?
A. The height of the seat above the ground I should estimate to be 3½ feet. I never measured it.
Q. How did the height of your eyes, sitting on the seat of that carriage, compare with the height of your eyes when standing by the side of the wagon?
A. I think the height was about the same; there was a very little difference.
Q. Were these cars which were on the two tracks to the left of you—the top of them—above or below the line of your vision when sitting in this carriage?
A. Above it, sir.
Q. Did you notice any opening in the lines of these cars so that you could see westerly on the east-bound track or in the direction from which the cars came which hit you?
A. No, sir. You mean by that was there any gap through which I could get a glimpse of the east-bound track before reaching it?
Q. Yes; did you notice any such?

A. No, sir; and I noticed no such point.

Q. At what point could you first get a glimpse of the east-bound track?

A. Scarcely before reaching the track—before being on it. I don't know (interrupted)——

Q. Yesterday, on the cross-examination, you spoke of hearing a voice to the left of you, "Look out," and you looked yourself
72 then on the crossing. The question that I now wish to ask you is (interrupted)——

Objected to.

The COURT: I think upon cross-examination he didn't locate himthere. You can ask him where he was when he heard that voice.

Q. Where were you when you heard that outery?

Gov. BEDLE: That has been pointed out on the map as between the first and second track.

The WITNESS: Yes, sir; that is it.

The COURT: You may ask him the question you have suggested as to its being himself or the wagon.

Q. When you spoke of being at a certain place in that connection what did you refer to, your horse or wagon or yourself?

A. I mean that I was there myself.

(By the COURT:)

Q. Where was your horse?

A. The horse would be a few feet in advance of me.

Further redirect:

Q. How much, about?

A. The horse's nose in advance of me?

Q. Yes.

A. Perhaps 10 feet.

(By the COURT:)

Q. Just point out again on the map where you were?

A. (Witness indicated on the map.)

Q. The wagon was on the second track, was it?

A. No, sir; between the first and second track.

73 Q. You were just west of the second track; is that what you say?

A. West of the second track; yes, sir.

Q. You locate the wagon just west of the second track?

A. When I first heard the voice?

Q. Yes.

A. Yes, sir.

Further redirect:

Q. That is where you yourself were?

A. That is where I was when I first heard the voice. I mean by the first track the track nearest the county grounds.

(By the COURT:)

Q. The most westwardly tract?
A. Yes, sir.

Further redirect:

Q. Some question was asked on cross-examination about passing off the roadway at some time or other with your wagon. Did any similar occurrence to that ever take place with you?

Objected to. Objection sustained.

(Mr. Vredenburgh stated that the following question had been omitted on direct examination:)

Q. Do you notice any difference in your ability since the accident to do continuous work? I mean such work as you can do without the use of the left arm?
A. I do.

74 Mr. VREDENBURGH: I now offer to show the doctor's wound, as described to the jury and counsel.

The COURT: This ought to have been done before the cross-examination; but if you desire to have him point out the wound let him do it as speedily as possible.

Q. Show your wound.
A. (The witness then took off his coat and vest, rolled up his shirt sleeve, and exhibited the wound to the jury. At the suggestion of Gov. Bedle, Dr. Elmer also made an examination of the witness' injuries.)

Recross-examination (by Gov. BEDLE)

Q. You didn't rise from your seat in the buggy at all, did you?
A. No, sir.

(By the COURT:)

Q. Suppose you had; suppose you had gotten on your feet, could you have seen over the car?
A. I suppose I could; I don't know about that.

Further recross:

Q. It depends on the height of the cars; these were coal cars?
A. Yes, sir; piled high with coal.
Q. And freight cars, as I understand you—they were ordinary freight cars?
A. Yes, sir; I suppose so; I didn't notice any difference.
Q. Do you know how many tracks there are to the left of that crossing?
A. Left going in which direction?
Q. The left of the crossing going towards Jersey City—that is, to the north.
75 A. There are four tracks.
Q. Don't go into details; give me the number, if you can.

A. I will have to reason it out in that way. 7 in all; four to the west and 3 to the east of the station.

Q. To the west of that there are other tracks, are there not, in the way of switches? You see some laid down on the track.

A. There is a regular labyrinth of them.

Q. It is where cars are stored oftentimes?

A. Yes, sir.

Q. I would like to get on the record, if I can, about whether you in the carriage were about midway between the first and second track. I judge so from the place to where you pointed.

A. There is a difference of only a foot or two, and of course I cannot tell. I don't pretend to be so accurate about that.

Q. I ask for your judgment.

A. I presume about as near the middle as I could be.

Q. Did you see the light in the station-house?

A. No, sir.

Q. You didn't look, I suppose, to see whether there was any there or not?

A. I have no recollection of that.

Q. You have no recollection whether there was any there or not?

A. I don't remember if there were any there or not.

76 PATRICK FALLON sworn for the plaintiff.

Direct examination (by Mr. VREDENBURGH):

Q. You live where?

A. Snake Hill—that is, at work; my place of residence is in Jersey City.

Q. Your place of residence is where?

A. Bishop street, Jersey City.

Q. Do you remember the night of the accident of Dr. Converse?

A. I do, sir.

Q. Where were you at the time that accident occurred?

A. Well, I could not tell you exactly. I was walking towards the railroad.

Q. From which direction?

A. From the penitentiary.

Q. And what was the first information that you had that an accident had occurred?

A. Some men come in with a lantern.

(By the COURT:)

Q. In where?

A. In towards the county farm—in on the county farm at that time.

Further direct:

Q. From which direction?

A. From the railroad.

Q. What then occurred?

A. He then asked if I had seen a horse come in that way.

Objected to.

The COURT: That is not evidence what the man stated to you.

Q. What then occurred?

77 (By the COURT:)

Q. What did you do? State that; you cannot state what he said to you.

A. I then went towards the station—towards the railroad.

Further direct:

Q. Yes.

A. There I found Dr. Converse walking up and down the railroad.

Q. Which way was he walking up and down?

A. Crossing the track on the inner track towards the county farm, partly on the county road and on the county farm.

(By the COURT:)

Q. Do you mean he was walking on the railroad or on the highway across the railroad?

A. On the highway across the railroad, walking right on up and down.

(Further direct:)

Q. The highway there at the railroad crossing is board or plank, or what?

A. Well, there are a few planks, stones (interrupted)——

(By the COURT:)

Q. Principally what?

A. Principally stone across the crossing.

(Further direct:)

Q. What do you mean by the crossing?

A. What I mean by the crossing is where the county road runs across the railroad.

Q. Is that plank do you say there, or stone, or what?

A. It is stone—it is crushed stone principally.

Q. And between the railroads is what?

A. Crushed stone.

78 Q. Do the wagons run on this crushed stone?

A. Yes, sir.

Q. And the doctor was walking on that, you say, when you saw him?

A. Well, not on the crushed stone; no, sir. He was walking inwards towards the guard-house.

Q. Who was with him?

A. There was nobody with him.

Q. What was he doing?

A. Well, I ran up to him, and he told me not to take hold of his arm. I said, "Doctor, are you badly hurt?" and he said, "Yes."

Objected to.

Q. Well, what did you then do?
A. The doctor requested me to hunt up his horse.
Q. Did you go after his horse?
A. I did, sir.
Q. Did you notice where his wagon was?
A. Well, part of it.
Q. Where was it?
A. Below the crossing towards New York.
Q. Did you notice whether or not there were any cars standing near the road on any of those tracks?
A. I did, sir.
Q. On which tracks were they standing?
A. Well, they were, you see, principally a mass of cars towards the county farm, all collected up. They were coal cars and freight cars.

79 Q. How near did the nearest part of those cars which were standing on the first track come to the county road at this crossing?
A. Well, to the best of my judgment, it was about 20 or 25 feet.
Q. How far did they extend down the track?
A. I could not say. I could not see the end of them.
Q. And on the second track how near were they?
A. Well, the second track, they might have been 75 or 80 feet.
Q. Measured from what point?
A. From the county road.
Q. When you refer to the county road do you mean the centre of the road or the side of the road?
A. Well, either; about the side of the road. It is not very wide at the crossing; not much more than 18 or 20 feet.

(By the COURT:)

Q. How many feet from the road do you say?
A. To the best of my knowledge, it might have been 75 or 80 feet. I could not positively say.
Q. You then went after the horse?
A. I did, sir.
Q. Did you go back there again?
A. I did, sir.
Q. What condition of things did you find when you got back there?
A. I found the doctor walking towards the station with Dr. King, coming in the station.

80 Q. Did you go in with him?
A. I did, sir; right after.
Q. How long did you remain with him?
A. Well, we remained there probably five or ten minutes with the doctor, and then I left there and went to hunt up a wagon to fetch him home, and came back again.
Q. With a wagon?

A. With a wagon.
Q. What did you do then?
A. I helped to get him in the wagon and fetch him home.
Q. Had you seen the doctor before that night?
A. I had, sir.
Q. Before the accident?
A. I had, sir.
Q. Where last?
A. Last?
Q. Yes.
A. On the county road.
Q. I understand you were walking from the penitentiary, along the county road, towards the railroad.
A. I was, sir.
Q. What is the distance, about, from the penitentiary to the county road?
A. Well, I could not say the exact distance; it may be a quarter of a mile; it may be a little more and may be a little less.
Q. Where was it the doctor passed you? Were you walk-
81 ing on that road?
A. I was; yes, sir.

(By the COURT:)

Q. He overtook you and passed you, did he?
A. Yes, sir.
Q. And where were you?
A. About at the turn of the road—what we call the turn of the road.
Q. How far from the railroad?
A. To the best of my knowledge and belief, I should think it would be about 400 yards; it may be more and it may be less.

Further direct:

Q. These cars which you saw you said consisted of coal cars and freight cars?
A. Yes, sir.
Q. Were the coal cars loaded or not loaded?
A. They were loaded.
Q. Do you recollect whether there is any platform some distance on the first track?
A. Oh, I know of a platform being there.
Q. About how high is that platform?
A. It may be five or six feet—the platform; it may be more.
Q. What is it used for?
A. Well, they unload coal there. I could not say. I think it is for loading engines.
Q. Do they put the coal on top of it?
A. Yes, sir; they put the coal on top of it. Sometimes there is coal on it and sometimes there is no coal on it.

82 Cross-examination (by Gov. BEDLE):

Q. Can you tell with any accuracy where that platform is?
A. Well, it is west of the depot.
Q. Can you come within 100 yards of the distance of it from the crossing?
A. Within one hundred yards?
Q. Yes.
A. Well, I should not say it was over 100 yards from the crossing.
Q. Do you think it is 100 yards?
A. Well, if I was—to the best of my knowledge and belief I would say it was about 100 yards.
Q. And you never had your attention called to the height of it, particularly?
A. I never had; only just noticed it.
Q. It is a mere general guess or general impression?
A. It is a—well, it is no general guess-work; I have often seen it.
Q. I mean as to the height.
A. As to the height, as near as I can possibly get to it, to my knowledge.
Q. I call your attention again to the cars on the first track. Those were standing cars, were they not?
A. Yes, sir.
Q. Coal cars?
A. Yes, sir; and freight cars.
Q. Were there any freight cars amongst them at all—on the first and second tracks?
83 A. Well, I could not say they were on the first and second tracks; I could not say what tracks they were on.
Q. Could you say there were any freight cars on the first track?

The COURT: That night?
Q. That night.

A. I cannot, sir.
Q. Can you say there were any freight cars on the second track that night?
A. On the second track?
Q. Yes.
A. To the best of my knowledge I believe there were.

The COURT: Not your belief, but your recollection.
The WITNESS: From my recollection I believe there were.

(By the COURT:)

Q. From what you saw that night?
A. From what I saw that night.

Further cross:

Q. Did you look that evening to see if there were any freight cars there? I don't mean coal cars.

A. Freight cars?
Q. Yes.
A. Yes, sir; I did.
Q. Where did you look?
A. I looked to the west of the depot.
Q. Now, if you saw any freight cars on that second night, where were they? And I don't mean coal cars.
84 A. I could not say, sir, which track they were on, whether they were on the first or second or third, or whatever there might be there. I don't know how many tracks there are there.
Q. I understood you to say a moment ago you didn't think there were any freight cars on the first track.
A. Not to my knowledge, I didn't say so.

The COURT: You said you didn't see there were any freight cars on the first track that night. Is that what you mean to say?
The WITNESS: That is what I say, to the best of my knowledge.

Q. You cannot locate any freight cars on the second track—you cannot tell us where they were on the second track, if there were any?
A. Not exactly.
Q. These cars that were on the first track, how far do you say they were from the side of the crossing?
A. Well, I should say they were 20 or 25 feet; maybe more and maybe less.
Q. They might be 50 yards, might they not?
A. On the first track?
Q. Yes.
A. No, sir.
Q. They might be 50 feet?
A. I would not say so.
Q. You say 20 or 25 feet?
85 A. Not over 25, to the best of my knowledge. I would not judge it over 25.
Q. You didn't measure it at all?
A. No, sir; only just a slight looking at it and noticing it.

(By the COURT:)

Q. Had you any particular occasion to know these cars or observe them?
A. Nothing more than to just locate the place under where the Doctor was struck, and just about where we found them.
Q. Where you found them?
A. Where I came up to them on the railroad.
Q. Did you look at the track to see what cars were there?
A. Well, I know (interrupted)——
Q. Did you do anything more than just see there were cars there?
A. I just saw they were there.
Q. Did you make any examination to see whether they were coal cars or freight cars or what they were?
A. I know they were freight cars; yes; I did.

Q. What interested you?
A. I don't know, any more than to look at them.
Q. Where do you live?
A. Jersey City.
Q. What is your business?
A. Keeper now in Snake Hill.
Q. Deputy keeper?
A. Yes, sir.

86 Q. How long have you been there?
A. Four years and a little over.

Q. I judge from what you said a little while ago—tell me if I am right—that you thought the Doctor was hurt about where you saw him first that night. Is that so?
A. What did you say?
Q. I judge from what you said that the Doctor was hurt about where you saw him first—that is, by the inner track, towards the county farm.
A. I don't remember of saying any such thing.
Q. What do you mean by that?
A. I say about where I came up to the Doctor, after this man had told me he was hurt, from about the point where he was walking—I should say it was about 20 or 25 feet to the first car, to the best of my belief.
Q. And the Doctor was to the west of the track when you saw him?
A. He was to the inner part—that is, towards the county farm.
Q. To the west of the first track—that is, towards the county farm—is that it?

Mr. VREDENBURGH: That is confusing, calling it west—that is, in that direction.

A. There is what they call the east and west-bound track.
Q. I don't mean that.
A. Towards the county farm, whatever you call that.

87 The COURT: The witness said the wagon was, part of it, over the track and the Doctor was walking back and forth.

Further cross:

Q. You walked across there often?
A. Yes, sir.
Q. The first track I call your attention to, towards the county farm—that is the first track. Did you see the Doctor to the west or to the east of that track?
A. Well, he was right on the crossing.
Q. I mean when you first saw him.
A. He was right on the crossing.

(By the COURT:)

Q. The crossing of the track?
A. Of the track and the county road.

Q. On which track?
A. The railroad track.
Q. Which one, I mean.
A. The one towards the county farm.
Q. The one nearest the county farm?
A. The inner one towards the county farm.
Q. That is where he was walking when you first saw him?
A. Yes, sir.

Col. JOHN GRIMES sworn.

Direct examination by Mr. VREDENBURGH:

Q. Where do you live, Mr. Grimes?
A. I live at the penitentiary, at Snake Hill.
Q. What is your business?
88 A. I am a warden of that institution.
Q. And you have been there how long?
A. I have been at that institution four years next July.
Q. How long have you lived in Hudson county?
A. I have lived in Hudson since 1854.
Q. What buildings are there on the county farm?

The COURT: What is the object of this?

Mr. VREDENBURGH: To show the number of people that are there, sir.

The COURT: What is the object of that?

Mr. VREDENBURGH: To show the public of this highway.

The COURT: It is a public highway, and that is enough, and the railroad company is bound to notice that fact, whether the road is much travelled or little travelled. The public rights upon it, of course, cannot be interfered with. That is a pure question of negligence. Whether there are ten thousand people or one thousand people there it will not make a particle of difference. This is a public highway, made for public travel, and the company, of course, are required to take the care that should be exercised wherever they cross a public highway at grade, and whether there are ten thousand people at this point or one thousand is not material. There is no use in burdening the case with such testimony. It seems to be regarded on both sides as a material issue, but it will not do. Of course, if it was a railroad running across the streets of a city that would be a different thing, but I take it that we are here to regard it as
89 an ordinary public highway crossing the railroad at a grade. I do not think you need to go into the inquiry whether this is a public highway of much or little importance. It is a public highway, and the railroad company is by its duty to public having a right to travel there required to exercise necessary care in doing so, and if it was exercised it is not the fault of the defendant company that this man was injured, and if it was in fault, then the railroad company is liable. There is only one single question so far developed, and you better not go into this question.

Mr. VREDENBURGH: I will not press it, then, may it please your

honor, that branch of it. I would like to ask this question, though, whether the public highway was there before the railroad.

Mr. BEDLE: I object to that. I do not know what the fact is.

The COURT: It will not affect the question; still you can ask it.

The COURT: I do not think it increases or diminishes the responsibility of the railroad, but you may ask whether this is an old and well-established highway.

Mr. VREDENBURGH: I will change my question, Colonel.

Q. You remember this highway for how long?

Same objection. Same exception.

To which ruling the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

90 WITNESS:

A. Well, I have been over that highway in 1857.

Same objection. Same exception.

To which ruling the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

Q. Was the railroad there then?

A. No, sir.

Q. Standing on this highway and looking eastwardly along the railroad where it crosses this road, looking eastwardly, how far is it to the first crossing?

A. Standing on the highway looking eastwardly?

Q. That is, towards New York. How far is it towards the next highway which crosses this railroad?

A. That goes under the next highway at Tonelle avenue.

Q. How far is Tonelle avenue?

A. I should think along the railroad about a mile and a half.

Q. What is the character of the land on each side of the railroad for this mile and a half?

A. All meadow.

Q. What is it used for?

A. Storing cars, principally.

Q. What is the meadow used for?

A. Not used for anything.

Q. It is an open meadow on each side?

A. Yes, sir.

91 Q. Now, looking eastwardly from this crossing, how near is the next street-crossing?

A. On that railroad there is not any crossing at all.

Q. And what is the character of the land for a mile that way?

A. All meadow to Hackensack river.

Q. On each side of the track?

A. Yes, sir.

Q. Is it used for any purpose?
A. No, sir; except for railroad purpose.

Mr. VREDENBURGH: I will not go into the question of the number of inmates or the number of people who travel this highway.

The COURT: If it is necessary you may show the number of inmates.

Mr. VREDENBURGH: It happens that this witness had occasion to count the number of carriages.

The COURT: If there is an allegation that this is an extraordinary highway, and if there is anything extraordinary about it, you may show it; but as the case is open it would be taken by the court and jury to be an ordinary public highway. If there is anything about it that is extraordinary and you desire to show it, you may.

Mr. BEDLE: It is very peculiar, we think, on both sides. It is right in the meadow, a piece of land that has been filled up in a swamp for railroad uses, and this road crosses, a road going to these county buildings, as they are called, on Snake Hill. In a great many respects it is not an ordinary farm road through the country.

92 The COURT: I do not take it to be an ordinary farm road at all. It is a public highway for all the citizens to travel on who have occasion to go that way, and if there is anything extraordinary in the extent of use or absence of use and you desire to go into that question you can, but as I see the case it will not make a particle of difference in the end.

Mr. VREDENBURGH: We do not want to go into it.

Mr. BEDLE: We do not interpose any objection; of course, if they do go into it they must take the consequences of it.

Cross-examination:

By Mr. BEDLE: When you spoke of this meadow—it is the meadow swamp. It all has to be filled in before it is used—the meadow I am speaking of?
A. Yes, sir.
Q. There are vast tracts of it?
A. Yes, sir.
Q. Thousands of acres?
A. Thousands of acres; yes, sir.

JOHN W. STEWART, a witness produced on the part of the plaintiff, being duly sworn according to law, testifies as follows:

Direct examination—Mr. VREDENBURGH:

Q. Mr. Stuart, were you at the place of the accident at the time or shortly after the accident to Dr. Converse?
93 A. I was.
Q. About how long after the accident?
A. I do not know at what time the accident took place, but I arrived there about 9.15.

The COURT: Was the doctor there then?
A. No, sir; he was not.

By Mr. VREDENBURGH:

Q. Did you examine to see where the cars were standing on these side tracks that night?

A. I looked around me and saw where the cars were standing.

Q. Who was with you?

A. Mr. Brady, one of the officers attached to the lunatic asylum.

Q. Did you do that when you first went there or after you were there some time; how was that?

A. Going there, we looked at them, and coming back, passing by, we looked at the cars, and going back again we looked at them.

Q. Why did you go back again to look at them?

A. On our way home.

Q. On your way home did you go back after you had started for home—did you go back and look at these cars?

A. Yes, sir; we went back again to look at them.

Q. Did you then examine to see how far these cars were from this crossing?

A. We made no measurement, only guess-work. We looked at the cars and saw where the cars were standing.

94 Q. Now, will you tell us were there any cars north and west of this crossing on the track next to Snake Hill?

A. There were.

Q. What kind of cars were there?

A. There were some—those that were close to us were what we call high gondola, high sides.

Q. Is a gondola a coal car?

A. It is a coal car.

Q. Where do they commence next to the county road and how near to the county road?

A. A very short distance.

The COURT:

Q. How near?

A. Well, without strict measurement, I should judge less than ten feet.

By Mr. VREDENBURGH:

Q. How far did they extend down the track?

A. To that platform on what they call the dead track.

The COURT:

Q. How far is that?

A. I judge it would be somewhere in the neighborhood of 160 or 150 feet.

By Mr. VREDENBURGH:

Q. Do you know at all whether there was anything on that platform?

A. There was coal piled up.

Q. Did you notice on the next track—the second track—whether there were any cars standing on that track?

95 A. We saw cars there.

Q. The- land on the—of course, on the side—on the left-hand side or the west side of the track?

A. On the second track.

The COURT: On the second track to the left?

A. On the second track to the left we saw cars a short distance from the crossing.

Q. How far from the crossing was the nearest of these cars?

A. Our judgment would be about a hundred feet or less.

Q. What kind of cars were they?

A. We did not go clean to those cars, but looking at them they seemed to be box cars.

Mr. VREDENBURGH:

Q. You spoke of high gondola cars. What do you mean by that? Are there two kinds of gondola cars?

A. There are.

Q. What are they?

A. The low and high—that is, with low side boards and with high side boards.

Q. How high are the high gondola cars?

A. I cannot tell you the exact measurement, but by standing alongside of them I could not reach to the top. They were way above me.

Cross-examination by Mr. BEDLE:

Q. Which car is that that you stood by?

96 A. This was since then that I stood by them to satisfy myself.

Q. You didn't go and stand by the cars that night?

A. Not that night.

Q. You stood by some other car?

A. To get an idea of their height.

Q. On what road?

A. On the same road—the same track.

Q. You stated that the cars that stood on the second track seemed to be box cars, but you didn't go to them. Why did you not go to them?

A. I did not have any occasion to go to them at that time.

Q. You saw them at a distance?

A. At a short distance.

Q. For what length did you see these cars to the left of you on the first track?

A. All the way along to the platform.

Q. And beyond?

A. There is not any track beyond the platform on that line.

Q. Then if we can get the distance—this is the side track, is it not?

A. It is what they call a dead track.

Q. That is where they stand cars and unload freight cars?
A. Yes, sir.
Q. And you have known that to be a dead track for some years past, have you not? You know that to be a dead track since you have been there at Snake Hill?
97 A. I know there are cars there.
Q. You understood my question, did you not?
A. Yes, sir.
Q. Will you please answer it?
A. I know the cars are there.
Q. That is called the dead track?
A. That is what I have heard it called. I am not familiar with railroad matters.
Q. That is the piece of track you say runs from the platform to the crossing, or very near there?
A. Opposite the crossing—that first track.
Q. You saw across, standing there, clear up to the platform?
A. Yes, sir.
Q. Any difficulty in seeing them?
A. Well, no; not any great difficulty. The night was dark—extremely dark.
Q. It was a moonlight night, was it not?
A. No, sir.
Q. It may have been moonlight?
A. There was no moon shining at that time.
Q. Was it not a quarter moon?
A. I do not recollect whether there was any moon.
Q. Have you no memory that there was a moon or not?
A. I have a memory it was dark. I do not recollect any moon.
Q. Now, these cars that stood on the first track were how far, do you think, from the crossing?
A. I judge about ten feet.
98 Q. You made no measurements or pacing that night?
A. No, sir; I did not pace them that night.
Q. What is your business?
A. I am deputy warden of the Hudson County almshouse.
Q. The same as Mr. Fallon is deputy?
A. No; he is in the penitentiary and I am in the almshouse.

The COURT:

Q. How far back is the end of the platform from the public highway?
A. I judge about a hundred and fifty feet or so, or somewhere in that neighborhood.

The COURT:

Q. I understand, but it does not approach the public highway nearer than a hundred and fifty or forty feet?
A. About a hundred and forty or a hundred and fifty feet.

Mr. JOHN KELLEY, a witness produced on the part of the plaintiff, being duly sworn according to law, testifies as follows:

Direct examination by Mr. VREDENBURGH:

Q. Mr. Kelley, were you at this crossing that night after the accident to Dr. Converse?

A. Yes, sir.

Q. Where did you come from to the place of the accident?

A. I came from the penitentiary, sir.

99 Q. Had you heard at the penitentiary of the accident before you left there?

A. I had, sir.

Q. And how soon after you heard of the accident did you get to the place where the accident occurred?

A. How soon I could not exactly say, sir; as soon as I could.

Q. Went on foot or how?

A. On foot, sir.

Q. When you got there did you see the Dr. there? Was he there when you got there or had he left?

Q. When I got there, sir, the Dr. was in a room in the depot there?

Q. In the station-house there?

A. He was sitting on a bench there or a board; I could not exactly say.

Q. Did you look to see where the carriage of the doctor was?

A. I tell you, sir, I was not looking for the carriage.

The COURT: You were not asked that; you were asked if you saw the carriage?

WITNESS:

A. I have never seen it, sir, I believe.

Mr. VREDENBURGH:

Q. Did you happen to notice if there were any cars standing on these side tracks towards the county institution?

A. To the best of my knowledge, sir, there was cars standing there.

Q. On which tracks?

100 A. That, sir, I did not go to look.

Q. And how long did you remain in the doctor's presence after you got there?

A. I remained with him, sir, until the wagon came and they removed him to it and put him in it and took him home.

Q. Remained with the doctor all the time or in his presence?

A. I remained with the doctor, sir, right alongside his head.

WILLIAM MAZWELL, a witness produced on the part of the plaintiff, being duly sworn according to law, testifies as follows:

Direct examination by Mr. VREDENBURGH:

Q. Mr. Mazwell, I think Mr. Fallon said he was walking with you?
A. Yes, sir.
Q. On the night of this accident, do you recollect the fact that Mr. Fallon was with you that night?
A. Yes, sir.
Q. Which way were you going?
A. I was going toward the railroad.
Q. Who met you?
A. There was some man came in with a lamp in his hand.
Q. From or towards the railroad?
A. From the railroad.
Q. What did you do then?
A. He asked us about a horse, if we saw a horse.

101 By Mr. BEDLE: That is Dr. Converse.

WITNESS:

A. I run back and notified Dr. King; I notified the people in the different institutions about the Dr. getting struck.
Q. And which way did Mr. Fallon go?
A. He went towards the railroad.
Q. And you went back?
A. Yes, sir; I went back to the institution.
Q. How soon did you go back to where the doctor was?
A. I should judge a quarter of an hour.
Q. Where was the doctor when you got back to the station?
A. In the station.
Q. Did you notice whether there were any cars on those side tracks?
A. Yes, sir.
Q. On the first track did you notice how near they came to the county road?
A. Yes, sir.
Q. How near did they come?
A. I should judge about ten or fifteen feet from the crossing.
Q. And on the second track, did you notice any cars standing on that track?
A. Yes, sir.
Q. How near did they come to the road?
A. I should judge about a hundred feet or a hundred and twenty-five feet.

102 JOHN BRADY, a witness produced on the part of the plaintiff, being duly sworn according to law, testifies as follows:

Direct examination by Mr. VREDENBURGH:

Q. Were you at the place of the accident after the accident occurred to Dr. Converse?

A. Yes, sir.
Q. Do you recollect looking for the wagon?
A. Yes, sir.
Q. Where did you find it?
A. Found it scattered all over the track.
Q. In which direction?
A. Towards New York.
Q. Did you happen to notice whether there were any cars on the track towards the Hackensack river?
A. Yes, sir.
Q. Adjoining the county farm?
A. Yes, sir.
Q. Just state how you happened to notice them and what you did in regard to ascertaining what the distance of these cars was from the county road.
A. On the first track there were cars all the way up to the coal platform.
Q. How near to the county road?
A. From the coal platform?
Q. No; to the nearest car from the county road.
A. Within ten feet of the side of the road.
103 Q. What were they—coal cars or freight cars?
A. Coal; and I think there were freight on the second track—high coal cars for freight.
Q. These coal cars—were they loaded or not?
A. Yes, sir; they are always loaded.
The COURT: No; were they loaded that night?
A. Yes, sir.
Q. How were they loaded, as to the height of the coal above the sides of the cars?
A. Some of the cars were loaded level and some of the high cars were loaded high up.
Q. How near was the nearest car on the second track to the county road?
A. I judge within about forty or fifty feet.
Q. Who was with you that night?
A. Mr. Stuart.
Q. After you started to return—do you remember whether you went back or not?
A. I was right on the crossing and stopped there.
Q. For what purpose?
A. Looking where the accident occurred.
Q. Did you make any special note of the distance of these cars?
A. Yes, sir. I made a remark that we were about the same as usual—close up to the crossing.

By Mr. BEDLE: We ask to have that ruled out. It was
104 not in answer to the question, and we could not object to the question.
The COURT: It was a remark of no consequence.

The COURT:

Q. Did you observe particularly where the cars stood—did you notice where the cars stood?

A. Yes, sir.

Q. Why did you?

A. On account of its obstructing the view coming out of the farm.

Q. Is that what influenced your mind in looking at the cars?

A. Yes, sir.

Mr. BEDLE: My motion was to strike out the remark which the witness made, "that we were about the same as usual—close up to the crossing."

The COURT: That will be stricken out.

Mr. VREDENBURGH:

Q. Did you happen to notice where you would have to go on the crossing before you could see westward, towards the Hackensack river, on the east-bound track?

A. Yes, sir; I did.

Q. Where did you have to go?

A. I had to get right on the westward-bound track.

The COURT:

Q. Standing on the ground?

A. Yes, sir; standing on the ground.

The COURT:

Q. Standing on the ground you would have to get where?

105 A. On the first main track.

Q. You could not see over?

A. No, sir; I could not.

The COURT:

Q. That is, when you were standing on the ground?

A. Yes, sir.

Cross-examination by Mr. BEDLE:

Q. You were with Mr. Stuart?

A. Yes, sir.

Q. How far did you say you thought the cars were from the crossing to the second track?

A. About forty or fifty feet.

Q. Was it not a hundred?

A. It might have been; I do not think it was.

Q. You heard Mr. Stuart's testimony and judgment that it was a hundred?

A. I did not pay much attention to it; I do not know exactly what he said.

Q. Now, without looking at the map at all, tell me how many tracks there are before you get to the east-bound track.

A. Before you get to the east-bound track?

By Mr. McGEE: Yes.

Mr. VREDENBURGH: Well, he might not know what you mean by the east-bound track.

By the WITNESS: Towards New York?

106 Mr. BEDLE: Towards New York; yes. You know it better than the counsel.

The WITNESS: Yes; I think there are two tracks; I will not be positive.

Q. Two side tracks?

A. I will not be positive, but it is my judgment.

Q. Before you get to the east-bound track?

A. Yes, sir.

Q. Now, supposing the cars on the second track—the second track coming from the county house—are fifty feet from the crossing, will you say how far you can see west before you get to the east-bound track? I mean north.

A. From the county road?

Q. Supposing, of course, the east-bound track was clear, assuming that to be clear, the east-bound track and the west-bound track to be clear—assuming that to be so now and the cars standing on the second track—how far could you see to the west, if you know, before you get to the east-bound track—just before you get to it?

A. You would have to cross the second track to see the yard—right on the other track.

Q. You would have to cross the second track?

A. Why would you?

The COURT:

Q. Where were you? I do not understand why you could not see that after you crossed the first track if the cars were standing back fifty feet on the second track.

A. They are all blocked up.

107 Q. All blocked up on the track?

A. Yes, sir.

Q. Assuming the cars to be standing fifty feet from there, if you stand on that platform you could see a long distance on the east-bound track, could you, to the north?

A. You can look up the track.

Q. How far can you see?

A. You could not see very far that night; I judge about seventy or eighty feet that night.

Q. The moon that night—was there any?

A. There was not when I was out. It was very dark.

Q. There was no rain?

A. No; I do not think there was any rain.

Q. What do you know of the moon; was it out that night?

A. I do not know.

Q. Do you know in what quarter it was?

A. I do not know whether it was three-quarters or not, but I saw no moon.

By the COURT:

Q. How far could you see up?
A. Sixty or seventy feet.

Mr. BEDLE:

Q. Have you tried?
A. No; I have not.
Q. That night or any time?
A. Yes, sir; when the day is clear you can look up the track.

108 The COURT: We are not speaking of the day, but that night.

Mr. BEDLE:

Q. I am speaking now of that night. Did you try to look up the east-bound track to the north?
A. Yes, sir.
Q. Where did you stand when you looked?
A. On the crossing.
Q. Of that track?
A. Yes, sir.
Q. There was nothing on the track then, was there?
A. No, sir.
Q. It was clear in the west?
A. Yes, sir.
Q. Did you look to the east to see whether there was any train there?
The WITNESS: On the east?
Q. To the north or to the south—up and down.
A. I do not remember.
Q. What is your business?
A. Assistant in the lunatic asylum at Snake Hill.

JOHN W. HUNT, M. D., a witness for the plaintiff, being duly sworn, testifies as follows:

By Mr. VREDENBURGH:

Q. Where do you live, Dr.?
A. In Jersey City.
Q. What is your profession?
A. Physician and surgeon.
109 Q. How long have you practiced your profession?
A. A little more than twenty-five years.
Q. Where?
A. First in New York, in the army, and in Jersey City.
Q. How long were you in the army?
A. About two years and a half.
Q. As surgeon?
A. As surgeon.
Q. Do you know Dr. Converse?
A. I do.

Q. Do you recollect his injury?
A. I do.
Q. Were you called to see him?
A. I was.
Q. When?
A. Between nine and ten o'clock on the 13th of March last, I think it was; I am not positive of the hour, but I think it was about that time.
Q. Where did you find him?
A. At the house of Mr. Cleveland, now mayor of Jersey City.
Q. In Jersey City proper?
A. In Jersey City proper.
Q. What was his condition?
A. He seemed to be suffering a great deal. There was evidence of shock, and he was suffering a great deal of pain.
Q. Did you make an examination of him?
A. I did.
Q. What did you find?
110 A. I found that he had a compound fracture of the lower portion of the arm-bone, the humerus, so called, and a fracture of the left clavicle or collar-bone, commonly known as the collar-bone.
Q. Were these injuries dangerous?

Mr. BEDLE: I object to that.
The COURT: He will have to describe just what they were and you can ask him the probable consequences.
Mr. GARRETSON: He has spoken of the shock and a broken bone.

The WITNESS: I considered him in a dangeous condition at the time.
Q. Why did you consider him in a dangerous condition, Doctor?
A. Because, first, I did not know how much injury aside from the local ones he had received; they were manifest.

Mr. BEDLE: I object to the form of the examination; this is supposititious; the result is known.
The COURT: Did the Doctor know the fact, or is this his impression or opinion at the time, or is it the result of the want of knowledge of his general position? Let him tell first what he knows about the injury fully, and then he can tell us what, in his medical judgment, was the probable consequence of such an injury.
Mr. BEDLE: I do not object to that.

Mr. VREDENBURGH:

Q. What was done with him? You attended to him as his physician, I understand.
A. Yes, sir.
Q. Go on and state what was done.
111 A. The first object was to ascertain how much injury he had received, and this was all local. The other injuries, of course, we could not determine at that time. I say of course be-

cause such injuries could not be determined. Those were the only bones I could ascertain that were fractured. The arm was contused—that is, there was a bruised condition of the arm at the point of the fracture. An opening, a small one, which I did not know at that time, communicated with the bone, which I supposed did, but I did not examine it to ascertain. We put him in a good position—as good as possible—and tried to get the broken bone in as normal a position as possible to make him comfortable. I am sorry to say we did not succeed in doing very well—that is, in making him comfortable.

Q. Well, go on.

A. A splint was applied of pasteboard, extemporized for the occasion, and an attempt was made to place him in a position to hold the broken ends of the clavicle as near in that position as possible. It was impossible to place the splint or any apparatus about his shoulders that would hold the bones in position and at the same time give him any comfort with his arm. The fact of the arm on that side being broken and the collar-bone being broken also on that same side, it was a very difficult matter to arrange any apparatus by which the position of the bones could be maintained in their normal position and at the same time render it comfortable to the patient. He suffered very much.

112 —. Well?

A. The day following another splint was adjusted with the hope of holding the bones in better position and which did seem to temporarily, but the suffering was so great that that had to be removed at short intervals and replaced, and the attempt was continued for a number of days before anything could be adjusted so that the doctor could be anything like reasonably comfortable, and as for sleep he had but very little for a week or two, if I remember right; he would sleep only at short intervals—a short time during the 24 hours; the opening through the tissues, which was the compound fracture of the arm, after three or four weeks closed, the bones united and formed a very much better result than I had anticipated.

Q. What was this opening—how was that caused, doctor?

A. I presume by direct violence; by his arm coming in contact with something in this position (illustrating); I presume so only by the situation of it and the manner of the fracture; possibly it was its striking against the body, but not likely; the probabilities were, I would think, from its striking against some object outside—extraneous from his body.

Q. How long did you attend him?

A. Until he was well.

(By the COURT:)

Q. The Doctor told us the effect of the treatment on the arm, but he has not told us yet the treatment upon the shoulder; how did that unite, Doctor?

113 A. It united with a good deal of deformity; the external fragment lying underneath the internal one, as it almost always does; the inner fragment overriding the outer fragment, leav-

ing a good deal of deformity and a spicula of bone standing up, which, I presume, by this time—I have not seen it for two or three months—I presume the sharp edge was rounded off somewhat, but that will remain, of course, always.

Q. Will that ever be removed?

A. I don't think so; there was a shortening of that bone probably half an inch.

Q. Of the collar-bone? How about the bone of the arm?

A. I don't remember whether I measured it or not; if I did I don't remember the shortening; I presume there was a shortening from a quarter to half an inch of the bone of the arm; that would be likely to be the case; that is considered a good result.

Q. How does the strength of the shoulder and the arm compare with what it was before?

A. It will never be as good in my estimation.

Q. What is the likely result of the whole injury to the man?

A. Well, it is my judgment that no man can withstand a shock of that character and injuries, however well he may appear afterwards, and be as good man physically as he was previous to the injury.

Q. In what way would his deficiency be apparent?

A. Well, it may be various; it may be in his ability to—as the movement of his shoulder, of his arm, as to a weakened con-
114 dition of his body to a certain extent, his inability to stand as much fatigue, his endurance not as great as it was previous to that accident; it may be almost inappreciable at this time, but it is my judgment that no man undergoes such a thing without having to pay the penalty of it afterwards.

Cross-examination (by Mr. BEDLE):

Q. What aged man do you understand the doctor to be?

A. Dr. Converse?

Q. Yes.

A. I don't know the doctor's age. I don't know but that he has told me, but I don't recollect it.

Q. He is a middle-aged man, is he not?

A. Well, I should call him rather under middle age.

Q. A vigorous man?

A. Yes, sir; I think he is.

Q. To all appearances?

A. Yes, sir.

Q. And he attends to his business?

A. I presume so; I have no reason to doubt it.

Q. This idea of shortening that you speak of—there is a great deal of theory about that, is there not?

A. No, sir; it is actual measurement. We don't theorize on that.

Q. Well, some physicians take the ground there cannot be any fracture without shortening, don't they?

A. I think not.

Q. You think not, eh?

A. I don't know of any.

Q. You think there can be a fracture without shortening?

115 A. I certainly do; appreciable; understand by that appreciable shortening; anything we can measure, understand by that, of course.

Q. I understood you to say you had not seen the collar-bone for the last two months?

A. I have not seen the collar-bone. I felt of it the other day, but I have not seen it since the first of July.

Q. Doctor, there are appliances in modern surgery, are there not, by which all these fractures of the collar-bone and arm, even when they are as they occurred in this case, are adjustable and practically adjustable, are there not?

A. That depends on the position of the fracture. It depends on the disposition of the patient to a certain extent—his irritability, his ability to bear—in other words, restriction. Certain appliances may be very comfortable to one man with a similar injury and exceedingly uncomfortable, even so that he could not endure it, to another.

Q. How soon did the doctor get on crutches?

A. He was not on crutches at all that I am aware of.

Q. What I mean is, how soon did he get out? That is what I meant.

A. He was out on election day, if I remember right; if you can figure that.

Q. That is, the spring election—the local election?

A. Yes, sir; I think so. I think that is the day I went there and found him out; when I went there in the morning.

JOSEPH H. VONDY, a witness produced on behalf of the plaintiff, having been duly sworn, testifies as follows:

116 Direct examination (by Mr. GARRETSON):

Q. Where do you reside?

A. Jersey City.

Q. What is your profession?

A. A physician and surgeon.

Q. How long have you practiced your profession?

A. 35 years.

Q. Where?

A. In Jersey City all that time.

Q. Do you know Dr. Converse?

A. Yes, sir.

Q. How long have you known him?

A. Well, I don't remember how long I have known him. I guess about 15 years, thereabouts.

Q. Do you recollect his being injured in March last?

A. I recollect being called to see him on the morning afterwards.

Q. What time in the morning were you called to see him?

A. Oh, I think about 9 o'clock. Doctor Hunt came for me to go with him.

Q. Where did you find him?

A. Where did I find him?

Q. Yes.

A. I found him around to Mr. Cleveland's house, in Wayne street.

Q. What did you find him to be suffering from?

A. From intense pain.

Q. What was the cause of the pain?

117 A. Fracture of the arm and of the collar-bone were the indirect causes.

Q. You spoke of his suffering with intense pain; did he suffer for any length of time?

A. Yes; he—well, he suffered intense pain every time, whenever there was a movement made of his body, for weeks afterwards, but at this time he was in constant pain, of course.

Q. These injuries that you saw, were they severe?

A. Yes, sir; very severe; just as severe as a man could have and live.

Q. Were they dangerous to his life?

A. Yes, sir.

Objected to as leading.

The COURT: It is too leading. You may ask the question whether they were dangerous. Ask any question now, and if there is any objection I will hear it.

Q. What was the character of the injury generally?

A. Well, that is a question that is a little difficult to answer. It is not specific enough. The injuries were very severe. In the first place he had a compound fracture of the arm, and in the second place he had a fracture of the collar-bone, and in the third place unfortunates who are damaged in that way by railroads generally die. I have seen a great deal of it in hospitals. I feel that a man who has had a railroad injury is worse off than if he had a similar injury come in any other way.

118 By the COURT:

Q. Why?

A. I don't know; they seem to have a terrible shock.

Q. Is that it; is it from the shock?

A. I presume it is. It is this: that in a railroad injury there is generally a great deal more injury done than is visible. If a man receives a bullet wound and breaks a bone we can see the full extent of it within a very limited space; but if he is knocked all about by a railroad train you cannot tell how much damage is done.

The COURT: The doctor can tell whether he examined him further and discovered whether there was any other injury than he found that night.

Further direct:

Q. Did you find any other injuries, Doctor?

A. Bruises here and there about; abrasions of the skin—what we call bruises.

Q. How long did you see him?

A. I saw him at short intervals for some weeks; I should think four or five weeks—five weeks certainly.

Q. During that time did he suffer?

A. He suffered very much.

By the COURT:

Q. Did he suffer for all that time?

A. I don't mean to say for all that time; but I mean to say if we attempted to put anything on him to keep his bones in place the suffering was very intense and we were obliged to remove them, and he suffered during that time even with the most easy appliances we could put on him.

119 Further direct:

Q. The effect of this injury upon him subsequently, Doctor, what do you think of that?

A. Well, I think it makes to a certain extent a cripple of him for life. He will never have the same use of his left arm that he had before. The use of it is limited.

Q. And as to the effect on him generally?

A. Well, the shock, the severe shock to the system, and then the amount of suffering that he endured afterwards for weeks of course takes so much out of a man that never can be put back again.

Q. Is there any likelihood of his suffering pain from it subsequently?

A. Yes; oh, yes; he is liable to suffer pain for years to come at intervals, and perhaps always. People after having fractured bones very frequently do have pain. They do not always, but very frequently do, and sometimes suffer intensely. It would depend a great deal on the pressure on the nerves, and so on.

Cross-examination (by Mr. BEDLE):

Q. Doctor, I want to call your attention to some of your forms of expression here. You say "bruises here and there about." You see that is pretty general. Can you tell us where there was any bruise outside of his shoulder and his arm?

A. I believe there was a large abrasion on one side, to the best of my recollection.

Q. Have you any recollection about it now, Doctor?

120 A. Yes; I think I recollect it just as I saw it.

Q. Does that justify you in saying to the jury there were bruises here and there about him?

A. I think so; because if there were two bruises and one was here and the other was there that would justify it.

Q. Well, we are speaking besides the fractures?

A. Yes, sir.

Q. And you have given us one and I think you gave it with some little question as to whether it existed or not, did you not?

A. No, no; I am pretty sure it existed.

Q. You cannot call your attention to but one, then, outside of the fractures?

A. Fractures are not bruises.

Q. I was not talking about those. I am speaking outside.

A. There was the hole through the arm.

Q. I am not speaking about that.

A. You don't talk about that?

Q. No.

A. Well, we will take "here and there" and leave "about" out.

Q. You didn't say that. You said "bruises here and there about." You see that is pretty broad expression.

A. Yes, sir; and there were bruises here and there about on his body and I didn't fix them down positively, not expecting to be questioned in this way, or else I should have had them all down.

Q. I am using your expression, Doctor; you ought not to give us that. Now, here is another expression: You talked about
121 "to a certain extent a cripple for life, never the same use of the bones," or words to that effect. Are not you dealing now with the question whether in case of fracture a man has the same use of his limbs or not? You are dealing hypothetically, are you not?

A. No, sir; I am not. I am dealing practically with this individual case. I examined him yesterday and I found that the motion of the arm was very limited indeed.

Q. Did you speak of the shoulder?

A. Yes; the shoulder particularly.

Q. Well, any physician could examine him just as well as you could now and tell the probable result of that injury, couldn't they?

A. I don't know whether he could or not; some can and some cannot.

Q. I mean if he was as skillful as you are?

A. Well, I think that if he had a chance of knowing what went before it would help him some.

Q. Now, Doctor, this question of shock, you are speaking generally of persons who receive railroad injuries? They generally die, you say?

A. A large proportion of them die.

Q. Well, those persons who are affected by the shock are generally rendered helpless by the accident, are they not, at the time?

A. It depends altogether how much (interrupted)——

Q. I speak generally, Doctor.

A. Well, I can't say anything general in that way. I can't answer the question that way.

122 Q. Well, persons who are affected by the shock are generally affected at the time, are they not?

A. Of course; and that shock continues.

Q. And it affects their locomotion generally at the time, doesn't it?

A. Sometimes it does.

Q. Generally, does it not?

A. Well, it depends upon the severity of the injury, if any one

receives an injury. If any one treads on your corns you receive a shock, but it would not interfere with your motion.

Q. Then you think that illustrates it?

A. I think it does, more or less.

Q. Well, you did not speak of that kind of shock, did you?

A. The other kind is that kind in a greater degree.

Q. You are speaking of shocks that kill people sometimes, are you not?

A. Yes, sir.

Q. Now, I want to know when a man receives a railroad injury, and the shock is serious and imperils his life, whether, speaking generally or as a rule, it don't make a man either insensible or helpless?

A. No; as a rule it does not make a man insensible, and I don't know that as a rule it makes him helpless—only partially so; it will make him partially so possibly. If a man receives a railroad injury and his leg is broken, of course he is partially helpless; some of it is from the shock and some of it from the injury itself.

123 Q. Do you detect any injury to the doctor by shock?

A. I did not see anything of him during the first twelve hours, and the reaction had come on after that time.

Q. Well, Doctor, please answer the question. Did you?

A. Did I what?

Q. (Question read as follows:) "Did you detect any injury to the doctor by shock?"

A. Did I detect any? I may have seen it and not (interrupted)——

Q. What is your recollection?

A. My recollection is I did not observe or think of that at that time; it was so long after the accident.

Q. And you have not observed any injury from shock since, have you?

A. I have not observed any injury from shock since; no.

Q. Now, a skillful surgeon, is not that one of the first things that he looks after, to see the effect of the shock upon the system?

A. No; I don't know that it is. I should think not after twelve hours or 16 hours. I should not think it would be the first thing he would look after.

Q. I said one of the first things. Of course you look at the fracture; but the condition of the patient, as to whether to stimulate him or the use of restoratives or strengthening appliances, all depend upon the condition of the patient, do they not, outside of the mere fact of the fracture?

A. I haven't got that question quite clear.

124 Q. (Previous question read.)

A. I presume so; but, you see, I was called in there to assist Dr. Hunt. Dr. Hunt was the man to take the responsibility to look after all those details.

Q. Now, what I ask you is this, Doctor: You have said the shock was severe. That is a form of expression which may mislead us.

A. I did not say the shock was severe in this case.

Q. That is the way I took you down. Now what I want to get at

is this: If you saw any indications of the result of shock—saw any result of shock there. If so, say so; if you did not, why please tell us that.

A. I have seen many things that I don't recollect all about, and I can't say that I did not see them.

Q. You can't say that you did?

A. I would not say that I did see them. I will say that at this time I was not looking for shock. I was looking to see the general extent of his injuries.

Q. Well, you were not his regular physician, were you?

A. No, sir.

Q. You were assisting Doctor Hunt?

A. Yes, sir.

Q. Now I ask you whether any skillful physician will undertake to treat a patient who receives such injuries as these without looking into the effect of shock upon his system so as to know how to treat him?

A. I think not. I think the physician who attended him (interrupted)——

Q. I didn't ask you that.

125 A. Don't put the question to me, because I had nothing to do with that. I was not his attending physician.

The COURT: Answer the question.

(The question read as follows:) "Q. Now I ask you whether any skillful physician will undertake to treat a patient who received such injuries as these without looking into the effect of shock upon the system so as to know how to treat him?

A. I think not. I think the physician who attended him (interrupted)——"

A. I think I should have been permitted to finish the answer, should not I?

(By the COURT:)

Q. Yes.

A. I think the physician who attended him—it was his business to look after him, and I presumed he had done so.

Q. The answer is satisfactory, Doctor. That is all.

GEORGE W. KING, a witness produced on the part of the plaintiff, being duly sworn according to law, deposes and says:

Direct examination (by Mr. GARRETSON):

Q. Where do you reside?

A. At the lunatic asylum, Snake Hill.

Q. What is your profession?

A. Physician.

Q. Do you have any knowledge of surgery?

A. I think so.

Q. How long have you practiced medicine?

126 A. 7 years.

Q. Where?
A. Jersey City.
Q. What capacity?
A. I have been nearly six years the medical surpeintendent of the lunatic asylum, Snake Hill.
Q. And before that?
A. I was practicing in Jersey City.
Q. Do you know Dr. Converse?
A. I do.
Q. How long have you known him?
A. About 7 years.
Q. Do you recollect the night he was injured?
A. I do.
Q. What was your first information about the injury—his being injured?
A. The keeper of the penitentiary, Mr. Maxwell, notified me that he was injured and I went down and saw him.
Q. Where were you when you were notified?
A. I was at the lunatic asylum.
Q. How far is that from the place where he was injured?
A. Well, it is very near half a mile, I should judge.
Q. Where did you find Dr. Converse?
A. I found him in the station shanty at Secaucus.
Q. Where was he, in what part of it, and in what position was he?
A. He was reclining—he was very fidgety and uneasy—he was reclining part of the time on a chair there, and then he
127 would get up and go about and seemed to be in great agony there.
Q. Did you make any examination of him?
A. Not there.
Q. What was done?
A. We procured a conveyance and had him carried to Jersey City.
Q. Did you go with him?
A. I did.
Q. You made no examination at all there?
A. Not there. I simply took hold of his arm with his coat on—without removing his coat; it was so painful that I could not make an examination of him.
Q. Did he suffer?
A. He suffered intensely.
Q. All the way to Jersey City?
A. All the way to Jersey City. The roads were not in good condition and each time the wagon would strike a stone—something like that—he would seem to be suffering very much.
Q. Where did you go to in Jersey City?
A. To the residence of Mr. Cleveland.
Q. What was done after you got there?
A. We undressed him and put him to bed. Dr. Hunt arrived there, and Dr. Hunt and I examined him and we found a com-

pound fracture of the arm and a fracture of the collar-bone. There was a few bruises on his body, a bruise on his leg, one of his legs—I believe it was his right leg—and some on the side, the left side.

128 Q. What was his condition at that time physically?

A. He was very much exhausted.

(By the COURT:)

Q. Is this the same night?

A. The same night, March 13th.

(Further direct:)

Q. What was the cause of his being exhausted, as far as you could see?

A. The shock and injury he had received and the pain.

Q. What was done with him?

A. I assisted Dr. Hunt in applying a pasteboard splint, in putting the broken fragments as near together as we could, and put him in bed and tried to make him as comfortable as possible.

Q. Was he suffering all that time?

A. He was.

Q. What time did you leave him?

A. I left him, I believe, about half past ten, probably later than that. I don't think I left him before eleven o'clock.

Q. When you came from the lunatic asylum down to the place of the accident did you notice the cars?

A. I did.

Q. What did you notice about the cars?

A. I noticed there were cars there on the left.

Q. Do you know how many tracks there are?

A. I could not say positively whether they were on both tracks, but I know there were cars there to the left.

Q. How close to the county road?

A. Do you mean the center of the road or the end?

Q. We will say the edge of the road.

129 A. Well, very close, almost onto the edge; I should say ten feet. It could not be any more than that.

Q. On more than one track?

A. I don't know whether they were on one or both tracks. I would not be positive about that. I am not sure. I simply noticed the cars there.

Q. How wide is the actual crossing where the wagons cross?

A. Well, I don't know how wide it is, but I do know from experience that two wagons cannot pass there at the same time—cannot pass that crossing where the—this side of the—the side nearer the county farm, between the county farm and that station.

Q. Did you remain with Dr. Converse from the time he went there until the time he was taken away?

A. I did.

Q. And then went away with him in the same carriage?

A. Yes, sir.

Cross-examination (by Mr. BEDLE):

Q. Did you say how long you had been a physician?
A. 7 years.
Q. And you were appointed medical superintendent (interrupted)——
A. Of the lunatic asylum at Snake Hill.
Q. A year after your admission as a physician?
A. Two years after—a year and a half after.
Q. The cars that were standing on that first track that night you did not examine, I suppose, so as (interrupted)——
A. I don't know whether they were on the first. There were two tracks there. I can't say positively which track they
130 were on—that is, I don't know. I could not speak with any degree of certainty.
Q. These cars that you saw, did you look out for the purpose of determining in any way how close they were to the edge of the crossing; did you or did you not?
A. Well, yes; I did.

(By the COURT:)

Q. You did look at them?
A. I did look at them to see how near they were to the crossing.

(Further cross:)

Q. Can you tell what the first car was?
A. The first car was a coal car.
Q. Did you go to it or not?
A. No, I did not go to it; I simply passed right by it.
Q. Could you tell us with any reliability, Doctor, whether that coal car was within ten feet or twenty-five feet from the side of the crossing?
A. Oh, yes; I am positive it was not more than ten feet from the nearest crossing.
Q. You are quite confident of that?
A. Yes.
Q. That is all.

By Mr. VREDENBURGH: We offer in evidence, on behalf of the plaintiff, the map and also the statutes of New Jersey—that part of the revision of New Jersey in which it is provided that trains crossing any crossing shall either ring the bell or whistle a certain distance from the crossing.
131 Mr. BEDLE: I object to that as irrelevant from the fact that — the locomotive he saw and as to the ringing of the bell or blowing of the whistle of the locomotive it is not a pertinent question in this case.

By the COURT: I will admit the statute and give you the benefit of an exception. Whether in the end the statute will be found applicable to the circumstances of the case the court will probably have to pass upon.

To which ruling the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

Plaintiff rests.

Defendants' counsel moves to nonsuit, first, upon the ground of contributory negligence on the part of the plaintiff, and, second, on the ground that no want of proper care on the part of the defendants has been shown.

Which motion was by said judge refused.

To which refusal of the said judge to order a judgment of nonsuit the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

Thereupon the defendants, to maintain the issues on their part, called as witnesses the following:

JOHN O'BRIEN, a witness produced by the defendants, being duly sworn, testifies as follows:

132 By Mr. McGEE:

Q. Where do you reside?
A. Jersey Heights.
Q. What is your business?
A. Night yard-master at Secaucus.
Q. How long have you been night yard-master there?
A. About four years.
Q. Were you there on the night of the accident to Dr. Converse?
A. Yes, sir.
Q. Did you see the accident happen?
A. Yes, sir.
Q. Where — you standing at the time it occurred?
A. On the end of the platform at the depot.
Q. Which corner?
A. Next to the county road.
Q. Next to what track?
A. Next to the west-bound track, main line.
Q. The S. E. corner?
A. Yes, sir.
Q. What were you doing there?
A. I was waiting.
Q. Waiting for what?
A. Waiting for the freight train to pass, to see what she had to leave.
Q. While there what was the first you saw of Dr. Converse?
A. The engine and twelve cars had passed.
Q. Before that had you heard anything of him?
133 A. Yes, sir; I heard him coming up the road.

The COURT: Had passed what?

A. Had passed the crossing.

Mr. MCGEE: You say you heard him coming up the road from what direction?

A. Snake Hill.

Q. At what gait?

A. I could not tell.

Q. Fast or slow.

A. Going on a trot.

Q. Did that trot cease before you saw him?

A. No, sir; it did not.

Q. When you first saw him where was he?

A. I judge about sixty feet from the nearest track to the county farm or sixty feet from the east-bound track.

Q. Sixty feet from the siding?

A. No.

Q. Sixty feet from the east-bound track?

A. Yes, sir.

Q. At what gait was he then going?

A. Going on a trot.

Q. Now, then, describe it from that point on.

A. As the engine and the twelve cars passed I could not see them as he passed by. I saw them coming, and I says, Hold on there; but the Docter came right on and did not slack up a bit; he kept holding them back—the lines back.

Q. Then what did you do—call again?

134 A. I hallooed "look out there" twice.

Q. At the time you hallooed, then, the first time you hallooed, where was he?

A. On the inside of the farm.

Q. Coming at the same gait yet?

A. Yes; coming at an easy gate, right along.

Q. He had not reached the first side track?

A. No.

Q. Not when you hallooed first?

A. Yes, sir.

Q. What did you see him do after you hallooed?

A. Kind of reined back; I could see the reins lift up.

Q. When you hallooed the second time where was he?

A. He was on the track.

Q. On which track.

A. On that long track—the receiving track.

Q. The first?

A. No; the second one.

Q. Then he was on that track when you hallooed the second time?

A. Yes, sir.

Q. What did he do then?

A. He drove right on.

Q. Did he slack up his horse at all before the accident happened—before the collision?

A. Not that I saw.

Q. Were you looking at him all the time?

135 A. From the time I could see him.

Q. Did you see him first as soon as the tenth car had passed?

A. Yes, sir.

Q. Now, what was the night, as to darkness?

A. It was a moonlight night; the moon had only just arisen.

Q. How far could a person see, for instance, a man walking or a buggy coming?

A. I should judge about a hundred feet.

Q. At the time you first called to him how far was the second section, or rather the thirteenth car, of the train from the crossing?

A. About three cars.

By the COURT: What distance would that be?

A. I judge about 28 or 33 feet; that is the length of a car.

Q. This train was made up of box or freight cars?

A. Yes, sir.

Q. What would be the length of three cars?

A. It would be about ninety feet.

Q. Then the distance, the break and the train, was about ninety feet?

A. Yes, sir.

Q. There was that distance between the end of the twelfth car and the front end of the thirteenth car?

A. Yes, sir.

Q. When you saw the Doctor the second time how close was that thirteenth car from him?

A. About thirty feet.

136 Q. You then made the second cry, and he was then just going on the track where the collision occurred?

A. Yes, sir.

Q. Is that what you mean?

A. Thirty feet from the crossing.

Q. Do you mean to say that at that time he had just begun to go on the east-bound track?

A. He had just left the other one in between the east-bound track and the long siding.

Q. He was in between the two tracks, then?

—. ——.

Q. You say the first time you called he was still on the county farm?

A. Yes, sir.

Q. Have you got the place?

A. It is a little more this way.

Q. Down by the gate?

A. There is no gate there now.

Q. When you called the second time he was about there (indicating).

A. Yes, sir.

Q. And when you called the first time you say you saw him pull up his reins, and then he went on——

Mr. VREDENBURGH: Now, Mr. McGee, that is the trouble in pointing. You are giving the evidence, and not the witness.

The COURT: What does the witness say?

Mr. VREDENBURGH: The witness, when he testified previously, said it was on this track that the Doctor was at the time.

The COURT: There is a mistake. The testimony was, "When I called out the second time the thirteenth car was about
137 thirty feet from the crossing. He was then between the second track and the east-bound track."

Mr. VREDENBURGH: There are a great many localities here, on the other side of the track, and that is the result of pointing out.

The COURT: The jury will know.

Mr. MCGEE: Then the collision occurred?

A. Yes, sir.

The COURT: How far was he from the highway or from the plaintiff when he cried out the first time?

Mr. MCGEE: I did not ask him this distance because of the map being scaled, but I will do so.

Q. Did you stand at the same place both times?

A. Yes, sir.

Q. How far were you from the highway or road when you called?

A. About nine feet.

Q. How far were you from Dr. Converse when you called the first time?

A. Between sixty and seventy feet.

Q. And the second time?

A. I should judge between thirty and forty feet.

Q. Were there any lights on the rear of the twelfth car as it passed the crossing?

A. On the rear of the twelfth car, yes, sir; there was a man standing on the side of the car.

Q. He had what?

A. A lamp on his arm.

138 Q. Were there any lights on the thirteenth car as it approached the crossing?

A. Yes, sir; there was a light upon it as it was coming up towards the depot.

Q. Where was that light?

A. It was on the thirteenth car.

Q. What part—on top?

A. On top.

Q. Who had it?

A. I could not say who had it.

Q. Was it fast to the car?

A. It was in a man's hand.

Q. Where was the man?

A. On the top of the car.

Q. Did you observe what became of that light?

A. I did not.

Q. Did you see it there?

A. Yes, sir.

Q. At what rate was this train moving, Mr. O'Brien?

A. I should judge about ten miles an hour.

Q. When I speak of the rate of speed I refer to the rear section, the thirteenth car.

A. It was going at the rate of about ten miles an hour.

Q. Just explain to us how that was done and what was being done.

A. As that train comes there they generally cut off what cars they want to leave, and the man that was to cut them off thought he was over the crossing.

Mr. VREDENBURGH: I object to that and ask that it be
139 struck out.

Mr. BEDLE: We consent to that.

The COURT: That is not evidence.

Q. They were cut off where?

A. I suppose they were; this is all I know; they came over the crossing in two sections.

Q. Then what becomes of the first section?

A. The first section goes on over the switches, and the second section follows it on. The second section stops there until the first section gets into the yard; they couple up and take the second section to Hoboken.

Q. That is what was being done that night?

A. Yes, sir.

Q. How many lights were there on the caboose, or was there any caboose on the first section?

A. No, sir.

Q. Was there on the second?

A. Yes, sir.

Q. Do freight trains always have a caboose on the last end of the train?

A. Yes, sir; generally.

Q. What is the rule as to having a caboose on the last end of the train?

A. It is on the end of the train.

The COURT: That is generally the case?

A. Yes, sir.

Q. Is there any exception to that rule?

A. Not that I know of.

140 Q. Don't they always have?

A. Some trains do not have a caboose; that — what I mean by that.

Mr. BEDLE: We are speaking of freight trains.

The COURT: All trains have a caboose?

A. On some they do and on some they do not.

Q. I am speaking now of the Lackawanna road.

A. On the Lackawanna they do.

Q. All have cabooses?

A. Precisely.
Q. What is the height of this caboose?
A. I would judge it was twelve or thirteen feet.
Q. What was its color?
A. Red.
Q. How many windows had it?
A. It had two, and a cupola window on top and two front windows and two end windows.
Q. By end what do you mean?
A. On the end.
Q. Sides?
A. None on the sides.
Q. What do you mean by the end windows?
A. That is, the back and front.
Q. What lights were there?
A. There was one on top.
Q. How high up above the roof?
A. I should judge about three feet.
Q. That was right on top?
141 A. Yes, sir.
Q. What other lights?
A. The end lights and the side lights.
Q. Where were they?
A. On the sides.
Q. One on one and one on the other?
A. One on the left and the other on the right.
Q. One on the left and the other on the right?
A. One on each corner, on the high corner.
Q. How far did it stick out from the side of the caboose?
A. There is a bracket on there.
Q. How far was the lamp out from the side of the caboose?
A. I should judge about five inches.
Q. What other lights are there?
A. The platform lights and two hand lights.
Q. The hand lights, you mean, on either end of the corner?
A. One each side of the door on the rear end and the front end; both.
Q. Now, these side lights—do you know as to the engineer, whether it was possible for him to see them?
A. Yes, sir; that is what they are put there for.
Q. It is what it is for?
A. Yes, sir.
Q. Now, this night did you notice the lights in the caboose?
A. Yes, sir.
Q. This night were they all lighted?
A. I saw the top light, the side lights, the hind lights, after the train had passed, all lighted.
142 Q. Did you see the top light after it had passed?
A. I saw the top light and the side light coming.
Q. After it had passed you saw the rear light?
A. Yes, sir.

The COURT: Ask him the question how many cars were in the second section?

Mr. McGEE: How many cars in that section?

A. Thirteen cars and a caboose.

By the COURT: Were they of the same length as the others—thirty feet?

A. I could not say the cars in the train were of different lengths.

Q. What do you say about that? What kind of cars were on that train composed of the thirteen cars and the caboose?

A. I could not tell. They run from thirty-three to twenty-eight to thirty-feet cars.

Q. That is what I desire to know. You say these cars were between twenty-eight, thirty, and thirty-three feet in length, each of them?

A. Yes, sir.

Q. Can you tell us the average or do you know the length — each particular car?

A. I could not say how many were twenty-eight feet or how many were thirty feet or how many were thirty-three feet in each train.

Q. You say some were twenty-eight and some were thirty-three feet?

143 A. Yes, sir.

Q. From that crossing—that Secaucus crossing—towards the west, how far is the road straight?

A. Well, you can say three miles straight.

Q. How is it about being level?

A. It is all meadows level.

Q. How far is it level?

A. There is three miles level there.

Q. Looking in the direction from which this train came, are there any hills between that and solid ground?

A. No, sir.

Q. Now, the doctor's buggy—just explain what kind of a buggy he was driving in.

A. It was one of those small buggies.

Q. Was the hood raised?

A. Yes, sir.

Q. When the buggy was going how did he sit?

A. Just about in that shape (indicating).

Q. What do you mean by the hood raised?

A. It was up over his head.

Q. The carriage top was over him?

A. Yes, sir.

Q. It was covering him?

A. Yes, sir.

Q. Now, as to the position. Was he sitting upright or was he leaning over?

A. I judge he was just about in that position (indicating).

144 Q. Was his head inside or outside of the hood?

A. Inside.

Q. Now, after the doctor was hurt did you have any conversation with him or hear him say anything?

A. Yes, sir.

Q. What was it?

A. After the doctor was struck I went to see where his horse was. I went down the railroad track. The express was due about that time, and I went to see where the horse had gone. I went across the track. I heard that the doctor was hurt.

Q. He was then talking?

A. Yes, sir; he said he was hurt in the arm.

Q. Did you hear the Doctor say anything?

A. Yes, sir; I heard hallooing.

Q. Did he say anything more about that?

A. No, sir; not at that time.

Q. Did you go to him afterwards and say anything on the subject in the depot?

A. Yes, sir.

Q. What did he say there?

A. Dr. King was talking to him inside of the depot, asking him if he was much hurt, and he said that he thought he was. He had a new horse, he said, and he could not manage it.

Q. Did he say that he had a new horse or a strange horse?

A. Strange horse.

Q. Was anything more said on this subject?

145 A. No, sir.

Q. Did you hear him say anything more about the hallooing?

A. No, sir.

Q. That is all on that subject?

A. Yes, sir.

Q. From where you stood on the top, how far were you from the east-bound track?

A. About fourteen feet, I should judge.

Q. How high up were you on the platform from the ground?

A. Two or three inches.

Q. How far west did you see the train coming that night?

A. Well, the first I saw or heard, I suppose it was about three hundred feet from there.

Q. Was that before she was cut?

A. I could not tell whether she was cut or not.

Q. You saw the whole train at that time?

A. Yes, sir.

Q. After the train was cut you could see the rear section coming along?

A. Yes, sir.

Q. Could you see the cars independently of any lights on them?

A. Yes, sir; I could see the cars coming.

Q. Could you see the man on top of the car?

A. Yes, sir.

Mr. VREDENBURGH (to the Court): It seems to me that the questions of Mr. McGee are rather leading.

146 The COURT: Yes; the questions are rather leading, Mr. McGee.

Mr. MCGEE:

Q. Now, how much was that crossing used, on an average, after night fall—as a road crossing I mean?

A. I should judge about a half a dozen wagons.

Q. At night?

A. Take it on an average that year around.

Q. Besides the doctor and the coroner who crossed there in the evening, do you know of any private carriages?

A. No, sir; I do not. There is the ice wagon and the undertaker's and the ambulance wagon.

Q. Is there anybody lives in there excepting those in the institution?

A. There is a colored man by the name of Thompson, who lives back on the hill.

Q. That is the only family?

A. Yes, sir.

Q. That is all?

A. That is all.

Q. Did this train make this cut, this same kind of a cut, every night there?

A. No, sir.

Q. How frequently?

A. You mean do they stop the cars and cut them in there every night?

Q. Yes.

A. Yes, sir.

Q. Does that train cut there every night?

A. Yes, sir.

147 By the COURT: You mean to say the train runs in there and cuts and comes back over the public highway every night just as it did that night?

A. No, sir.

By Mr. MCGEE: What do you mean?

A. I mean they cut the cars there every night.

Q. Not always at the same point?

A. No, sir.

Q. At different points?

A. At different points.

Q. About that same place every night?

A. Yes, sir.

Q. And about the same time?

A. Yes, sir.

Q. Does the doctor—Doctor Converse—usually go home at that time or later?

A. Sometimes earlier and sometimes later.

By the COURT: When the train does cut is it there that it cuts and goes across the track in two sections or does it cut somewhere else?

A. Not at all times, but it cuts there when it does cut.

Q. That night, after Dr. Converse went to the county farm, did you see him?

A. Yes, sir.

Q. Tell us if anything occurred at that time.

A. The train was coming—I was standing on the east-bound track and the caboose stood on the crossing.

Q. Now, then——

148 Mr. VREDENBURGH: I object. They are attempting to show what the doctor did at some other time.

The COURT: What is the object of this?

Mr. MCGEE (to the Court): My object, may it please the court, is this: I propose to show by this witness the doctor went that night to the county farm. There was a coal train standing on the east-bound track with the caboose on the road crossing, and that the doctor, instead of waiting for the caboose to pass, went off towards the west cut of the road over the railroad track, where there was no crossing. Then I propose to follow it up by showing the accident occurred by carelessness on the part of the doctor.

The COURT: Is that admissible; and would it be for the plaintiff to show alleged acts of carelessness on your part and charge you on this occasion?

Mr. MCGEE: Perhaps not. It does not seem to me that the two cases would be parallel.

The COURT: Why not?

Mr. MCGEE: Here is a case where there is a road-crossing. If I can show it is a fixed habit when he reached that point to drive ahead of approaching trains or to drive out of the road to get around retreating trains without waiting, it seems to me it is an item which is valuable and which is important to present to the jury in weighing the probabilities and getting at the weight of the testimony.

149 Mr. VREDENBURGH: We will not object if we are permitted to show how careful a man he was.

The COURT: Do you accept the proposition?

Mr. BEDLE: We cannot make any bargains about it. We have our rights here. Counsel asks us to make a bargain with reference to a certain thing which we cannot do any more than he would do it.

Mr. VREDENBURGH: I will do it in a minute. I will do it now.

Mr. BEDLE: You make your proposition.

The COURT: One moment. There is no use of any controversy, although it is kindly controversy.

Mr. BEDLE: Certainly; we mean nothing else.

The COURT: It is quite plain it is not evidence. There is no better way of illustrating it than in considering whether or not the plaintiff here could charge these defendants with any negligence by showing that by their action the day before they were guilty of negligence or any more than the defendants did show that at noon-day of that day the plaintiff was negligent. That would not be permitted to be shown. The plaintiff must be shown to have committed some act

of negligence on that particular occasion when the train was passing, and so the defendant must be shown to be guilty of negligence on that particular occasion and no other occasion. The law will not permit the plaintiff to produce evidence of that kind. Now, it is not legitimate on the part of the defendant to show negligence in the plaintiff, if the defendant can, and it is negligence upon this
150 occasion, not negligence upon some other occasion. It is negligence if there was anything that contributed to this accident. The plaintiff was himself asked the question, and there was some objection to it. The court said that a great many questions that are not strictly relevant may be asked for the purpose of testing the kind of memory and accuracy of the witness, but the party asking the question—such a question—is bound to accept the answer. He cannot contradict it. I have no hesitation at all in sustaining the objection to this offer, and the defendants can have an exception if they desire.

Mr. BEDLE: We simply ask for an exception, not to the general offer, but only to that part of it which has reference to the Doctor's conduct in going over there on every occasion when he went to the almshouse—that point of it only.

The COURT: We will allow an exception to that part of it.

Mr. BEDLE: We take an exception to that part of the ruling of your honor. My associate offered to show the conduct of the Doctor in going over to the county-house that evening—on the trip to the county-house—and then he brought it out by saying he proposed to show his conduct at other times. That is the ruling; it does not take in the whole.

The COURT: Yes, sir; I understand your proposition.

Mr. BEDLE: We do not ask any exception to the first part of that offer; only as to that part which had reference to his
151 conduct when he went to the almshouse that night.

The COURT: Very well; you can restrict your offer of testimony in that way and it will be so held.

To which ruling the defendants excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

Mr. BEDLE: Yes, sir.

Mr. MCGEE: That night, Mr. O'Brien, after the accident——

The COURT: I see that it is now one o'clock, the hour for adjournment—the usual time for taking the recess—and we will go on punctually at two o'clock.

After recess.

By Mr. MCGEE:

Q. After the accident did you make any investigation of the side tracks and their condition?

A. Yes, sir.

Q. How soon after?

A. Probably three-quarters of an hour or half hour.

Q. What did you find first and where did you go and what did you find?

A. I found all the tracks clear back to number one.

Q. Won't you show us on the map where you went, where you looked and how you looked, and who went with you?

A. No one went with me at that time. These are the receiving tracks up here, back in the yard, connected with number one.

152 This receiving track goes back into the yard and connects with four different tracks.

Q. How far back did you find them clear?

A. Away back to number one.

Q. Where does number one begin?

A. They have not got it on the map.

By the COURT:

Q. How far back from the public highway?

A. About two hundred feet.

Q. That track, you say, was clear back to number one?

A. Yes, sir.

Q. In order that we may get this on the records straight, which track is that, in relation to the county farm—the first or the second track? Just point out.

A. That is the second track.

Q. From the county road back for two hundred feet?

A. Back for 200 ft., where it connects with No. 1 switch.

Q. Now, on the track next to the county farm, what do you call that?

A. Next to the county track the track is called a spur.

Q. What did you find on them?

A. Nothing.

Q. No cars at all on it?

A. No, sir.

Q. What did you have with you in order to enable you to see?

A. A hand lantern.

Q. In your hand?

A. Yes, sir.

153 By the COURT: Now, let us not misunderstand each other about this matter. What the witness says is that on the track nearest to the county building there were no cars at all.

A. No, sir.

By Mr. MCGEE: How far back does that track nearest to the county building run?

A. Into the coal bins.

Q. How far back from the crossing?

A. It holds five box cars.

By the COURT: I understand that witness to say that there were no cars at all on the track nearest to the county buildings, to the left of the county highway.

Mr. BEDLE: Yes; he says that.

By the WITNESS: That is so.

Mr McGEE: That is towards Kingsland?

A. Yes, sir.

Q. On the second track there were none until you came to number one?

A. Yes, sir.

Q. That is two hundred feet?

A. Two hundred feet.

Q. You say no one was with you at that time. Did you go at any other time with anybody?

A. I did go and stand on the crossing where that remark was made.

Q. With whom and what?

A. Mr. Coffee made that remark.

The COURT: Never mind the remark, but say where and when.

154 Mr. McGEE: He says he stood on the crossing. The count was when?

A. After the accident.

Q. How soon?

A. About half an hour.

Q. What part of the crossing did you stand on?

A. Right on the west-bound track—right at the corner of the depot.

Q. You and he stood there together?

A. Yes, sir.

Q. How far could you see up the track to the north?

A. Towards Kingsland?

Q. Yes.

A. I judge we could see about a hundred feet.

Q. Then, at that time, was there anything there?

A. No, sir.

Cross-examination by Mr. VREDENBURGH:

Q. You have been employed there how long?

A. Four years at that point.

Q. On March last what were your duties there?

A. Night yard-master.

Q. What are the duties of the night yard-master?

A. Putting away coal and freight and holding what coal we wanted to hold there; sending what coal they wanted on to Hoboken.

Q. Where was your station?

A. In the depot.

155 Q. When you were not engaged you were at the depot, were you?

A. Yes, sir; I was at all parts of the road within two miles whenever there was work to be done to tell them how to do it in the yard.

Q. Did you go up and down the track?

A. Yes, sir.

Q. During the whole evening?

A. Not in the evening. That is my occupation. The two miles either way there.

Q. Now, that evening what was your occupation?

A. I stood on the corner.

Q. You were doing the same thing, were you not, and you were then still the yard-master that evening?

A. Yes, sir.

Q. You were not off duty that evening?

A. No, sir.

Q. You were on duty and acting as night yard-master?

A. Yes, sir.

The COURT: May it not be well to inquire what duties were imposed on a night yard-master? Is it for him to attend to the transfer of cars—to see to the removal of cars—and to pay some attention to the trains crossing? Has he anything to do of that kind?

Mr. VREDENBURGH: Well, if your honor desires I will enquire into that.

The COURT: I would like to know.

Mr. VREDENBURGH: Your honor would like to know whether he had any personal responsibility.

156 Q. As yard-master, when a freight train comes in there and anything is to be done, do you attend to it?

A. Yes, sir; I tell them where to put them and see that the switch is all right.

Q. Tell who?

A. The trainmen—the conductor.

Q. Then you go to the switches and see that the switches are properly turned?

A. Properly set where I want to put them.

Q. What other duties have you besides that?

A. Besides what—putting away the cars?

Q. Do what you say you do when the train comes in. What other duties have you?

A. I have nothing to do excepting to see that the cars are put so; that the cars are in the right place.

Q. Your duty is to see that the switches are placed properly?

A. Yes, sir.

Q. That takes you some distance up the yard, does it not?

A. Yes, sir.

Q. Are you liable to do other duty besides what you have specified—turning the switches and seeing that the cars are put on the proper tracks, in the proper place?

A. Yes, sir; after giving the orders.

Q. That is all of your duties as night yard-master?

A. Yes, sir.

157 By the COURT: You have nothing to do with the moving out of this train and this section of the train?

A. No, sir.

Q. You had nothing to do with that?

A. I had nothing to do with that.

Q. Nothing was imposed upon you in relation to that?
A. No, sir.
Q. That is not your business, to move the cars?
A. Well, if there are cars in the way I have got to move them to get them back in the yard. That is my place, to see that it is done.
Q. No duty respecting the cars crossing the highway?
A. No, sir.
Q. Don't you also as yard-master indicate, by a light or in some other way, how far the car and what speed the car was to be sent into the switch and how come back?
A. Yes, sir. If I gave them their orders where I want them to go back I do it with my lamp, giving them a signal.
Q. You turn the switch and give them a signal and take a sort of control over the train as to how far it should go back?
A. Yes, sir.
Q. That is for the purpose of running the train back?
A. Yes, sir.
Q. You have nothing to do, as I understand you, with running the cars or the train or the sections of the train or the train crossing the public highway?
A. No, sir; nothing at all, sir.
158 Mr. VREDENBURGH: Now, on this particular night, Mr. O'Brien, how long had you been standing on that platform before that train came?
A. Well, the engine was about six or seven cars from the other end of the depot coming this way when I went outside.
Q. You had been inside of the depot after that?
A. Yes, sir.
Q. Doing what?
A. Sitting down talking.
Q. And then, hearing the train whistle or hearing some indication that the train was coming, you went out on the platform?
A. Yes, sir.
Q. What was it you heard that induced you to think the train was coming?
A. I heard the ringing of the bell.
Q. When you got out on the platform the engine of this train was some three or four car-lengths from the depot?
A. Yes, sir; west of the depot.
Q. Three or four car-lengths?
A. Yes, sir.
Q. That would be a hundred to a hundred and fifty feet; somewhere about there?
A. Yes, sir; somewhere about there.
Q. Now, what duty have you to perform as to this train?
A. Well, I had to find out what they had to leave.
159 Q. Did you tell any one that night what they had to leave there?
A. No; I had to find out. They had to tell me.
Q. You did not know what they had to leave there?
A. No, sir.

Q. You had to find out from them what they had to leave?
A. Yes, sir.
Q. Go on and tell us—who tells you what they had to leave?
A. The head brakeman jumps off and he tells me.
Q. Who did this night?
A. The conductor.
Q. Where was he?
A. He was in the caboose at the time going by there, and he got off the caboose to tell me at the depot.
Q. Did he get off at the depot?
A. Yes, sir.
Q. He jumped off at the depot?
A. Yes, sir.
Q. Now, I understood you to say the first train and the second train when they passed you were about a hundred feet apart.
A. Ninety feet. The first and second sections of the train made one train.
Q. The first and second sections of the one train?
A. Yes, sir.
Q. When was it you noticed the man that night first?
A. I could not really tell what time it was.
160 Q. Did you notice the moon when you were out on the platform?
A. Yes, sir.
Q. Where was it?
A. It was off here in the east.
Q. How high above the horizon in the east do you think the moon was that night when you went out on the platform?
A. I could not tell; it was clouded over.
Q. It was cloudy over the moon, you say?
A. Yes, sir.
Q. Do you think the moon was in the east?
A. Yes, sir.
Q. Now, did the moon remain clouded over until the accident, so far as you know?
A. I do not remember.
Q. I was asking you whether it did or not?
A. No, sir.
Q. Now, after you got out on the depot steps, how long did it take for that engine to get opposite you?
A. I could not say—about a minute.
Q. About a minute, you think?
A. About a minute or two.
Q. So it came a hundred feet, and it took about a minute or two for the engine to run that distance?
A. Yes, sir.
Q. You heard the Dr.'s horse before the engine came?
A. Yes, sir.
Q. Now, how many cars were there fast to that engine?
161 A. Twelve.
Q. That engine and those cars came between you and the Doctor?

A. Yes, sir.
Q. Did you count the cars?
A. Yes, sir.
Q. While this engine was coming between you and the Doctor you were counting the cars. Do you mean to say that you heard the Dr.'s horse's hoofs all that time?
A. Pretty much all that time.
Q. How could you, Mr. O'Brien, with this engine coming and the train of cars coming between you and the horse—you could hear the horse's hoofs pretty much all the time, or do you mean to say you heard him once in awhile?
A. I could hear him once in awhile.
Q. Once in awhile. While you were counting the cars your attention was not paid to this horse trotting, was it?
A. No, sir; not altogether.
Q. You heard the Dr. before the engine passed you. Now, did you see the Dr. between these two sections of the train?
A. Yes, sir.
Q. You did?
A. Yes, sir.
Q. Do you say, Mr. O'Brien, that you said several times—did you say that night to both Mr. Brady and Mr. Stuart—you had seen them both on the witness stand, have you not?
A. Yes, sir.
162 Q. Did you say to them that that rear train was coming, in your judgment, at the rate of fifteen miles an hour, or words to that effect?
—. ——.
Q. You did not say so?
A. No, sir.
Q. Where was the Dr.? Did you see or hear the Dr. between the two trains?
A. Yes, sir.
Q. Which did you say? Did you say you saw him or heard him?
A. I both saw him and heard him.
Q. Between the two trains?
A. Yes, sir.
Q. When you saw him between the two trains where was he?
A. He was between sixty and seventy feet.
Q. Sixty or seventy feet from where?
A. From the track.
Q. From where you stood?
A. Yes, sir.
Q. From which track—what did you say—you said the track—what do you mean—sixty or seventy feet from which track?
A. From the east-bound track.
Q. He was sixty or seventy feet from the east-bound track?
A. Yes, sir; I should judge about that.
Q. Was that the first you saw of him?
A. Yes, sir; I saw him going in that night.

Q. I mean, of course, coming this way. That is the first you saw of him coming in the direction of Snake Hill?

163 By the COURT: That is what he said.

Mr. VREDENBURGH:

Q. Is that what you say?

The WITNESS:

A. Yes, sir.

Q. When was it you called to the Dr., before the engine with the twelve cars passed you or after they passed?

A. After they passed.

Q. You say they were ninety feet apart?

A. About ninety feet apart.

Q. And you think that the rear train was going at the rate of ten miles an hour?

A. I should judge that it was going about eight or ten miles an hour.

Q. You swore ten a minute ago.

A. I said eight or ten.

Q. I beg your pardon; I understood you to say ten.

A. I think I said eight or ten.

Q. Did you have a lantern with you?

A. Yes, sir.

Q. You saw the Dr. sixty feet from the east-bound track. Do you know where the moon was then, or was it under a cloud?

A. I was not looking at the moon then.

Q. Did you count the cars of the second section?

A. Yes, sir.

Q. Well, then, you were looking at the cars and counting the cars of the first section?

164 A. Yes, sir.

Q. You counted the cars of the second section also?

A. Yes, sir.

Q. From where you stood how many cars had to go by you before that hit the Dr. of that section?

A. How many cars?

Q. Yes.

A. I was right on the crossing.

Q. You said you were on the platform, did you not?

A. About nine feet from the crossing from the road.

Q. Did you stand still and count these cars when the engine had run over this man?

Mr. MCGEE: The engine did not run over this man; it was the car.

Q. The cars. Did you stand still?

A. I counted these cars after that time.

Q. You said after that time you counted them; when did you count them?

A. I counted them after the train passed by; there were thirteen cars, counting the caboose.

Q. Did you walk down and count them afterwards?
A. Yes.
Q. When did you do that?
A. I did that right after the accident.
Q. Mr. O'Brien, did you not, as soon as you saw this accident was going to happen, run into the depot?
A. Yes, sir; I told them in there.
Q. You ran into the depot so that you would not see the
165 remainder of the train pass, did you not?
A. Not at that time.
Q. You swear you saw the lights on the side of that caboose and on the end of the train, and also you saw the lights—the end lights—in the train after it passed?
A. Yes, sir.
Q. How could you have seen the lights on the top?
A. I went into the depot. After I got into the depot I waited until the conductor came and then I told him.
Q. How? Did you not run into the depot to avoid seeing the doctor hit?
A. No, sir.
Q. What did you run to the depot for?
A. I tell you that I went in there after the Dr. was run over.
Q. Did you wait for the Dr. or did you wait and count the cars of that train before you went in and told them?
A. No; they were all inside before he came up.
Q. You ran right in and told them?
A. I said I did not go in until they had come up.
Q. Have you not said, Mr. O'Brien, that you wanted to get rid of seeing the accident and you run in?

Objected to unless the name of the parties are given.

Q. Did you say that to Mr. Stuart?
The WITNESS: Say what?
Q. Did you say that when you saw this accident was going to occur that you ran into the depot to prevent seeing it, or words to that effect?
166 A. No, sir.
Q. Nothing of that sort?
A. No, sir.
Q. Did you say that to Mr. Brady?
A. No, sir.
Q. Or words to that effect?
A. No, sir.
Q. You were out on the platform when the caboose passed you, were you not?
A. I was outside; yes, sir.
Q. Could you notice the lights?
A. Yes, sir.
Q. How soon was it after that you went down to see where the Dr. was?

A. All the time there was—they had him standing up, off the track, and I heard the Dr. say, "Where is my hat?"

Q. You did not count the cars at that time, did you?

A. I had the cars counted at that time.

Q. Before the caboose passed?

A. Yes, sir.

Q. You had the cars in the second section counted before the caboose passed?

A. Before the caboose passed; no, I could not; the caboose was the last car.

Q. When was it passing?

A. I counted them when they were passing.

167 Q. I just understood you to say you went away and counted them. Which do you mean to say is true? Did you count them after the train broke or before?

A. I counted them after the train broke.

Q. Then you did not count them standing on the platform, did you?

A. I do not understand what you are trying to get at.

Q. Did you turn your back, Mr. O'Brien, when you saw the accident was going to occur so that you would not see it?

A. No, sir; I saw the horse's head going off this side, and I run in and told them at the door that the Dr. was run over. I saw the horse make out this side of the car and escape from the car.

Q. Which way did the horse go?

A. I could not tell when I went to the door which way he went. That is what I went down the track to see. After the train passed I went down the track to see.

Q. You do not know which way the horse went?

A. No, sir.

Q. One of these gentlemen went up after the horse?

A. Yes, sir.

Q. Who was he?

A. Mr. Fallon was looking for the horse.

Q. Among the men from the railroad station who went up towards Snake Hill was Mr. Fallon?

A. That was Mr. Coffee.

Q. Now, I did not understand you very clearly. I do not

168 know that you were very clear about the cutting of these trains. Is it the habit to take a flying switch across the highway?

Mr. McGee: It is not a flying switch; it is a running switch.

Q. What do you call that, a flying switch or a running switch. Which is it?

A. You cannot call it a flying switch; it is a running switch, because when you make a fly you run the cars opposite to the first——

Q. Then the idea is when you make a fly you push them and when you make a running switch you push them and make a run after them? That is the distinction?

A. A flying switch you can make it either way.

Q. Now, that is what you technically call a flying switch?

A. No, sir.
Q. You call it a running switch?
A. A running switch.
Q. Now, to return to the question, is it the habit of this company at that highway to make a running switch such as this? What do you say?
A. Yes, sir; that cut off the cars; run ahead while the hind end is following.
Q. Across this highway?
A. Yes, sir.
169 Q. You are clear about that crossing at this highway? They are in the habit of making a running switch?
A. Yes, sir.
Q. They cut off the cars, sending the engine on ahead and allowing the remaining part of the train to come across this highway without the engine fast to it?
A. I do not know whether they cut that train or not. I saw the train coming in two sections.
Q. How do you mean in two sections—two engines?
A. No; with two sections of cars crossing the highway. I do not know whether they cut them or not. I could not swear that they cut them; I did not see them cut.
The COURT: You saw the train separated?
A. Yes, sir.
Q. What is the difference—what did you say?
A. I say I did not see them cut them.
Q. You saw them after they were cut?
A. Yes, sir.

Mr. VREDENBURGH:

Q. Is it a habit or do this company generally cut at that highway to make such a running trip as they made this night?

The COURT: Was this usual or unusual, you mean?
Mr. VREDENBURGH: Yes, sir. Then the counsel asked him and your honor asked him, and I am asking the very same question.
The COURT: Asking about this train?
Mr. BEDLE: You can ask him; we do not object.
170 Mr. VREDENBURGH: I understand that now, but I would like to have an answer to my question, if I can get it.
A. Sometimes they cut them there.
Q. Then—now, you know that is not in answer to my question, did you not, Mr. O'Brien?

By the COURT: Do not let us spend our time in this way.
Mr. VREDENBURGH: I will not dwell on it long. I would like to have an answer of some sort.
Mr. BEDLE: You have got it.
Mr. VREDENBURGH: No; I have not, Governor. Is it the habit of this company to make a running switch across that highway?
A. At some times.

Q. Sometimes you do and sometimes you do not. Is that what you mean?

A. Yes, sir.

Q. Was there any necessity for doing it that night and was there not plenty of room to do it and do they not generally do it here (indicating)?

The COURT: Now, you are getting into a wide scope of inquiry. You want now to introduce into this case the practice of the railroad company. It would be a pretty extensive field.

Mr. VREDENBURGH: Well, sir, I will not go into that.

Mr. BEDLE: A good deal of engineering comes into that question.

The COURT: This would be a very long inquiry.

171 Mr. VREDENBURGH: Well, there may be and ought to be a little more common sense about this engineering.

Q. Mr. O'Brien, I understood you to say that there were windows in this caboose. They are not as large as these windows, are they?

A. No, sir.

Q. The windows—do you call them windows in a caboose, or what do you call them—these little things in a caboose, are they called windows?

A. I believe that is the name of them.

Q. They do call them windows?

A. Yes, sir.

Q. They are not very clean about them?

A. They most generally give them a rub.

Q. Can you tell on the outside of a caboose whether there is light in there or not?

A. Where the light is they keep that clean always.

Q. Mr. O'Brien, I understood you to say that you thought, as far as you could say, looking between those two trains, you looked at the end of the first train and saw the light in there. Did you say that?

A. No, sir.

Q. You did not look to see?

A. I had no business to look there. There was a man there hollered out to me that he had twelve cars.

Q. Where was he when he hollered?

A. Down on the platform of the car.

—. Whereabouts was he when he hollered to you?

172 A. It might be about ten feet west of the crossing.

Q. Up nearly opposite to you?

A. About opposite to me.

Q. Now, then, when your attention was taken from him and you looked up the county road, you then for the first time saw the Dr., did you?

A. The first time in coming out; yes, sir.

Q. He was then almost in front of you, was he not?

A. About 60 or 70 feet.

Q. In front of you?

A. Yes, sir; a little anglewise—across. I stood about nine feet off the road.

Q. You thought, as you say, that he had both his reins in both his hands?

A. Yes, sir; he sat just about in that posish.

Q. I understood you to say that the horse was, as far as you could see, making no other motion other than a forward motion from the time you saw it until the accident. Is that so?

A. I did not understand that.

Q. The horse, from the time you saw the horse up to the time you saw the accident, did not appear to go any faster, but kept on about the same gait, as far as you could judge?

A. Yes, sir; he kept on a trot.

Q. You say that you and Mr. Coffee had some conversation. Was that before the Dr. left or afterwards?

173 A. I think it was just right after the Dr. was going away—that is, when he went away in the ambulance.

Q. Did you see Mr. Stewart or Mr. Brady there that night?

A. I do not remember of seeing those two gentlemen there.

Q. Now, when the conversation occurred between Dr. Converse and Dr. King, about which you have told us, who else was present there, if you recollect?

A. I do not remember.

Q. Do you remember that Mr. Kelly was there?

A. No; I do not. I know that he was there, but I do not remember whether he was there at that time.

Q. Do you recollect whether Mr. Fallon was there at that time?

A. I do not recollect that.

Q. Do you recollect whether Mr. Mazwell was there at that time?

A. No, sir.

Q. Do you recollect whether Mr. Joyce was there at that time?

A. Not at that time. I remember seeing him there afterwards.

Q. Now, was the meeting between you and Mr. Coffee on the crossing before or after you went to look to see if there were any cars on the side track?

A. Before.

Q. The conversation with Mr. Coffee was had before you went to look?

A. Yes, sir.

174 Re-examined by Mr. McGEE:

Q. Now, about this counting of the cars.

Mr. VREDENBURGH: I have not asked him any questions as to the counting of the cars.

Mr. McGEE: You made a great deal of confusion about it also.

Q. You said, first, you stood on the platform and counted the cars as the first section went by?

A. Yes, sir.

Q. Mr. Vredenburgh asked you how and when you counted and you got confused.

By the COURT: This is not exactly the thing. You examined him and the counsel have cross-examined him, and you have no right to go back to that and examine over again.

Mr. MCGEE: The questions of the counsel were put in such a manner that they confused the witness.

The COURT: That is for the jury.

Mr. MCGEE: That is true; but it seems to me that where there is a confused state of affairs I have the right to ask the witness what he meant to say.

The COURT: You may ask him what he meant to say. It is a mistake for counsel, after the witness has been examined in chief and told his story and after he has been cross-examined, to
175 be re-examined again and go over the whole subject again, and in that way go back and forth.

Mr. MCGEE: If your honor pleases, I have no desire to do that; but here is an illiterate man, a man not accustomed to answering questions in court, especially when the questions were put as rapidly as they were and not at all clearly.

The COURT: You may ask him where he did count the cars, but you must not go over the subject again.

Mr. MCGEE: I want to get out what he really did answer and whether he has got his answers correctly on the record.

The COURT: Ask him whether he counted the cars and get his answer.

Q. Then tell us how and when you did it—when you counted the cars and where you were when you counted them.

A. I was on the end of the platform when I counted the first twelve, and then I ran to the door; after that then I counted the thirteen cars and the caboose; after that——

Q. Where were you then?

A. About opposite the door—at the depot.

Q. When you counted which?

A. The last section.

PATRICK QUINN, a witness, being sworn for the defense, testified as follows:

176 Direct examination by Mr. MCGEE:

Q. Where do you live and what is your business?

A. I am working at laboring at present.

Q. On the 13th of March last what were you working at?

A. I was a brakeman.

Q. On what railroad?

A. The Delaware and Lackawanna.

Q. On the train running from where to where?

A. From Port Morris to Hoboken.

Q. Were you on board of this train on the night of the accident to Dr. Converse?

A. I was.

Q. Did you see the accident?

A. I did.

Q. Now tell us where you stood, and explain to us how you saw it—just what you saw.

A. I am a little wrong. I did not see it strike the Dr., but I saw him going on the track.

Q. Now just explain to us when you first saw the Dr. and all that followed. On what car were you, to start with?

A. When they were coming in there I was on ahead—on the rear section, and hind end of that—head car up on top.

Q. At the time the train was cut on what part of the car were you?

A. On top of the car.

Q. What car?

A. The head end of the hind section.

Q. The thirteenth car of the train?

177 A. Yes, sir.

Q. Now, just tell us on what part of the car were you.

A. About the centre.

Q. Did you have anything in your hand?

A. I had my lantern.

Q. Your lantern was in your hand?

A. In my left hand I always carried it.

Q. In your left hand?

A. Yes, sir.

Q. Now, then, the train was cut, and the front part of the train went faster than the other part?

A. Yes, sir.

Q. Then what did you do?

A. Well, as we were coming up to the station I went back—straight on back—to the rear end of the car.

Q. On what part of the car did you walk?

A. On the centre; on the roof of the freight car.

Q. You did what?

A. I put on the brakes.

Q. In order to do that did you step down any?

A. I stepped down about two feet.

Q. What was there to stand upon?

A. There is a platform about six inches wide and about two feet long.

Q. What did you do then?

A. I took up the slack of the brake chain.

Q. Where was your lantern all this time?

A. My lantern was held in the other hand, and it hangs down.

178 Q. It was in your other hand?

A. Yes, sir.

Q. By the by, was this lantern lighted all this time?

A. The lantern went out as I took up the slack of the brake chain.

Q. You stepped down on the platform?

A. Yes, sir.

Q. Then what did you do?

A. I took up the slack of the brake chain and I looked ahead.
Q. Why did you go on and take up the slack of the brake chain?
A. Because——
Q. Did you start to put the brake on or only take the slack up?
A. Only to take the slack up.
Q. You stood waiting to put it on when the time came?
A. Yes, sir.
Q. When the cars were cut how far back were you from the crossing?
A. I do not exactly know; about ten or twelve cars, I should judge.
Q. You say you were about ten or twelve cars from the crossing when the cut was made?
A. Yes, sir.
Q. Now, at the time your light went out how near were you to the crossing?
A. I was not over the lengths of two cars—maybe about three cars.
Q. Not over two cars?
179 A. Somewhere about two and a half or three cars, as near as I could judge.
Q. Where were you when you first saw the Dr.?
A. I was in at the brake, as I told you; I had wound up the slack of the chain.
Q. You were standing up, then?
A. Not when I saw the Dr.
Q. What were you doing?
A. I had taken up the slack of the chain.
Q. In what position were you standing?
A. I was down two foot, standing up straight.
Q. That is what you mean, you were standing up straight at that place?
A. Yes, sir.
Q. Where did you see the Dr.?
A. The first thing that drew my attention to him was I heard a man holler.
Q. What did he say?
A. He hollered "Hold on there," or "Hey"—something of that description.
Q. Then what?
A. Then I looked ahead, and I heard him holler again very loud, and I looked over in that direction on that side of me (indicating).
Q. Towards the county-house?
A. Towards the county farm-house; yes, sir; and I saw a carriage approaching there and I hollered loud.
Q. What did you say?
180 A. I hollered "Hold on there."
Q. How often?
A. Once.
Q. Where was the carriage then?

A. The carriage then and the horse's head was about ten feet from the track when I saw the horse's head and the carriage there.

Q. You saw the carriage?

A. Yes, sir.

Q. And the horse?

A. Yes, sir.

Q. Could you see anything in that carriage?

A. Yes, sir.

Q. What did you see?

A. I only saw the form of a man—the robe under his knee.

Q. Could you see the whole body?

A. No, sir; I could not see nothing but his knees—about there (indicating), up to that point there.

Q. You only saw, what?

A. Just his knees about there (indicating)—the form of the knees, the blanket on them, the form of them.

Q. Did the man stop?

A. No, sir.

Q. At what gait was he driving?

A. Well, the horse was just trotting.

Q. You say you are sure the horse was trotting?

A. Yes, sir.

181 Q. What was the next thing you saw?

A. That was all. The horse went right on and we struck the carriage by the car I was on.

Q. After you passed in front of the car could you see him?

A. No, sir.

Q. After the accident did you see him?

A. I saw the Dr.; yes, sir.

Q. Did you recognize who it was?

A. No, sir; I did not recognize who it was, only Mr. O'Brien told me—he hollered.

Q. You heard the halloo?

A. Oh, yes, sir.

Q. How far from the track was the Dr. or the carriage when that first outcry was made?

A. I did not say that; I did not see the Dr. at that time.

Q. When you first looked up how far were you from the Dr.?

A. When I first looked up and saw him I heard the halloo at the same time the Dr.'s head was about ten feet from the track.

Q. Now, the first section of the train went away from you. Do you know what lights there were on the rear end of that train?

A. Yes, sir.

Q. What were they?

A. One man stood on a platform of the car—iron steps. He was down there on the bottom platform of the car, holding fast to the sides of the freight car.

182 Q. What did he have?

A. He had a lantern.

Q. Was there any other lantern on the rear car?

A. There was a lantern on the top of the box car.

Q. Was that fast to the car or did a man have it?
A. Yes, sir.
Q. Any lights there—other lights?
A. Yes, sir.
Q. Where were the lights?
A. On the top of the last car of the first section there was a man with a lantern.
Q. Do you mean to say there were two lights on the car?
A. One light on the car; one on the frame of the car. The frame is alongside.
Q. There were really two lights connected with that car?
A. Yes, sir.

By Mr. McGee:

Q. Was there a caboose attached to the second section?
A. Yes, sir.
Q. How many?
A. From seven to nine lights.
Q. Describe what lights there were.
A. In the first place, there is a light in the caboose for the conductor. It stands up about two feet, about the top of the caboose; and there is a couple of windows with white lights. You can see them there the same as you would see in a house if there was a light in it. Then on about a foot and a half from the other windows, in the centre of the caboose, is a small red light.
183 Q. On the top?
A. Yes, sir.
Q. It is about five inches square?
A. It is about five inches square and about ten inches high. Then on the inside, half way down the caboose, on the rear end, is a little place there with a lamp about five inches square and about ten inches high.
Q. That is on the inside?
A. Yes, sir.
Q. On each side?
A. On each side. On the rear end of the platform there are two lamps—not stationary ones—and then there are two stationary ones visible behind—small ones.
Q. In the windows in front of the caboose are there any lamps?
A. Yes, sir.
Q. Are the lights lighted?
A. There are two lamps in front lighted; yes, sir.
Q. Were these lights lighted that night?
A. Yes, sir; they were all lighted.
Q. These side lights that you spoke of, can the engineer see them?
A. Yes, sir.
Q. This other top light, you say, is right on the top of the caboose?
A. Right on the top; yes, sir.
Q. What kind of a night was it—was it light?
A. It was not very dark.

184 Q. How far could you see the outlines of objects or objects themselves at that time?

A. You could see the form of a man about a hundred and fifty feet, and you could tell whether it was a man or a woman.

Q. How did your light happen to go out and what was the cause of it?

A. It was very windy that night when I went over the roof of the car, and I put it down between those cars and there was a rush of wind, and I do not know what caused it hardly, but the wind come up there.

By the COURT:

Q. That blew the light out?

A. That blew the light out.

Q. Now, did you, after the accident, make any examinations of the sidings to see whether there were any cars?

A. I did.

Q. Now, just tell us what you did and when you did it and who was with you, if anybody.

A. Well, I came back. I stopped my section of the train (interrupted)——

Q. That is, after you got across the crossing?

A. Yes, sir; I came back and I lit my light in the caboose and came on back and looked around a little. I looked around the cars to see if there was anything of the Doctor and his horse, and I came back and I found out he had not gone over by the cars.

Q. What do you mean by that?

185 A. I looked around for the horse and the Doctor also. I thought he might have been fast under the wheels or somewhere by the way he was struck and he was not, and I came on back and I asked where he was and they told me he was in the station. They were looking then for the horse—some of the men—the conductor and Mr. O'Brien were looking around for the horse in different places, and I went in and spoke to the Doctor and asked him if he was hurt and he said yes, he was in great agony, and I told him he came off very luckily.

Q. Never mind; just tell us the examination you made.

A. I came on out and Mr. O'Brien and me was up there and we took a view of the land—view of the cars and things.

Q. With your lights?

A. Yes, sir.

Q. You each had a light?

A. Yes, sir.

Q. Whereabouts did you go to?

A. Came up the county road there a little ways, right across the tracks.

Q. How far from the track? Can you show me on the map? Or you can tell me; that will do just as well.

A. Well, we came on the center of that last crossing.

Q. That side track?

A. Yes, sir.

Q. The one next to the county farm?
A. Yes, sir; and stood there with our lights.
186 Q. What did you find?
A. Well, we talked over the view we had (interrupted)——

By the COURT:

Q. Never mind talking over the view. What did you see?
A. We passed the remark to each other (interrupted)——
Q. Never mind about that; just tell us what you saw.
A. Well, it was almost impossible to see anything, because there was nothing there.

(Further direct:)

Q. Now, what did you see about the cars? Were there any cars on the track?
A. No, sir; there was not.
Q. On which track were there no cars?
A. No cars on either track.
Q. Did you go on there any further or did you go back?
A. Walked back slowly and looked around.
Q. How long was this after the accident?
A. It must have been ten or fifteen minutes.
Q. Was anybody with you besides O'Brien?
A. No, sir.
Q. What kind of cars was your train made up of?
A. Box cars.
Q. You mean freight cars?
A. Yes, sir.

Cross-examination (by Mr. GARRETSON):

Q. Who cut the train in two?
A. I don't know.
Q. Did you?
A. No, sir.
Q. When it was cut in two on which car was you?
187 A. I was on the head end of the hind section.
Q. Were you on the front car before that?
A. No, sir.
Q. On what part of the car was you?
A. I was on the head end of it.
Q. Well, on the platform or on the top?
A. On top.
Q. What were you doing there?
A. I was there to apply the brakes when it became necessary to stop the car.
Q. The brake was on the front end of that car. Why were you on the opposite end?
A. Well, we were there talking together.
Q. With whom?
A. With the rest of the brakemen.
Q. Who?

A. Their names?
Q. Yes.
A. Well, Mr. Shuster was one.
Q. How many were there together?
A. Three of us.
Q. Between those two cars?
A. Yes, sir.
Q. Which one of you cut the train in two?
A. We were not between them cars; the three of us were there. We came there to where the cars were to be cut.
Q. Why did you go there?
188 A. I went there to see whether that was the proper place to be cut or not.
Q. Was it your duty to cut them?
A. No, sir.
Q. Then, how did you happen to be there?
A. Well, I will explain that to you. If that was not the proper place to cut he would have went on further and I would have went with him, but by going onto that car he found that was the proper place to cut, and I stopped and remained there because that was my place.
Q. As soon as they were cut, did you go to your brake?
A. Yes, sir—no; I started on back easy. I didn't go on down to the brake.
Q. How long did you stay on the top of the car after they were cut?
A. Well, it doesn't vary a minute.
Q. How fast was the train going—the part you were on?
A. I should judge going 8 or 10 miles an hour.
Q. You got down on the board where you stand to put on the brake?
A. Yes, sir.
Q. And how soon after you got up on there did you take up the slack in the brake?
A. Right immediately.
Q. Where was the car then with regard to the county road?
A. The car then was coming within about 100 feet of the road.
Q. How far was the train from the county road when the first section left the second section?
189 A. I could not say that.
Q. How far apart were they when you got to the county road?
A. They were about the length of three cars.
Q. When you saw Dr. Converse you say he was within about 10 feet of the east-bound track?
A. Yes, sir.
Q. His horse?
A. His horse's head was about 10 feet.
Q. You were at the brake?
A. I was at the brake.
Q. What did you do?

A. Well, I didn't do anything just then; I held fast; I found it necessary for me to hold fast.

Q. Hold fast; what do you mean by that?

A. So it would not shake me off.

Q. How soon did you shout after you saw the Doctor?

A. When the Doctor was about 10 feet from the crossing.

Q. When you first saw him?

A. Yes, sir.

Q. Immediately on seeing him?

A. Yes, sir; not the Doctor, but the horse's head.

Q. Did you see the Doctor then?

A. I saw the form of a man—no, sir; I did not. I saw the form of a man in the carriage.

Q. Well, that was the Doctor, wasn't it?

A. Yes, sir.

Q. Did you put on your brake?

A. No, sir.

190 Q. Why didn't you?

A. Well, I found it necessary to hold fast or else I would have been shaken off myself.

Q. When you found this train was about to run into a man why didn't you put on the brake?

A. Well, there was no need of it; wasn't any use then.

Q. You didn't attempt to do it?

A. Yes, sir.

Q. When?

A. I attempted to do it at the same time.

Q. I understood you to say just now you did not.

A. Well, putting on the brake, as I told you before, I took up the slack of the brake and was about to put on the brake when I heard this man cry out, "Hold on there!" or something similar to that, and I looked around, and that would naturally stop a man's work, and I saw the doctor and I hallooed also, and the horse was about 10 feet from the crossing, and a man could not put on much of a brake going 10 miles an hour in a distance of 10 feet.

Q. And when did you brake that train up?

A. Right away.

Q. How far did it go before it stopped?

A. The train went about the length of about 18 box cars.

Q. How far was the caboose from the crossing when it stopped?

A. About 6 or 7 cars.

Q. What become of the first section?

A. It went on.

191 Q. How far?

A. Well, I could not say exactly, but the head end of my section just stopped so they could get into the switch.

Q. So you stopped it where it was intended to stop so the locomotive could go on and get it again?

A. Yes, sir.

Q. Did they dispose of their cars then?

A. Not at that time. They were fixing to do it.

Q. Where were they?
A. On that side, back of the station.
Q. East or west of the road?
A. West of the road.
Q. I mean the county road?
A. Yes, sir.
Q. How many lights were there altogether that night about the caboose?
A. Well, they were all lit, and I think that makes 9.
Q. How many of those lights can be seen from the front and on one side of the train?
A. Well, you can see two very plainly.
Q. Which two?
A. The top one and one side.
Q. The top one and the one that is against the side of the caboose?
A. Yes, sir.
Q. What is the color of the one against the side of the caboose?
A. Red.
192 Q. And the one at the top is the one that shines out of the window in the little upper place?
A. No, sir; it is a red one, too—the one put on top, and the window light shines out also; that is a white light that is put there to light the conductor if he writes, or anything like that, the same as in a house.
Q. It is not a light that is put outside for a warning?
A. No, sir.
Q. Was that the only two lights that were visible from the front and one side of the train—rather the track?
A. Yes, sir.
Q. The others are on the other side of the train or in the rear of the caboose or down front, are they?
A. Yes, sir.
Q. How many cars were there between the car with the lights—this caboose—and the car you were on?
A. Well, I could not say exactly. The conductor said we had 13 cars.
Q. Any lights on any of those cars?
A. No, sir.
Q. None at all?
A. Not only until the time my light went out. Then there was none. There was a light there until that went out, approaching the crossing.
Q. That went out before you got to the crossing?
A. Yes; a little before we got to the crossing; yes, sir.
Q. That went out, as I understand you, when you went there to put on the slack?
193 A. Yes, sir.
Q. After they had cut the train in two and the other part had gone on?
A. Yes, sir.

Q. Which way was the wind blowing?
A. Well, that is a pretty hard matter to tell. It generally blows (interrupted)——
Q. No; that night; that is all.

Redirect examination:

Q. Within what distance can you stop one of those sections of a train, such as you were on, going at that rate?
A. Well, I can stop them in about once the length of itself—once and a half the length of a car.

(By Mr. BEDLE:)

Q. Do you mean car or train?
A. That will make 12 cars, say 12 cars. We would stop it within the length of 16, or, 3 times 6—18.
Q. When you say you could stop it in once the length of itself?
A. ——.
Q. Do you mean to say you can stop a train in a length and a half of a car? That is what you said.
A. Yes, sir.
Q. A car is about 35 feet long?
A. Yes, sir.
Q. Do you mean to say, then, you could stop a train in 45 feet?
A. Oh, no.

(By the COURT:)

Q. What do you mean? How many feet?
A. Say, take 3 cars, go to apply the brakes, and you could stop them in the length of four cars and a half.

194 (Further direct:)

Q. If you had 12 cars?
A. Yes, sir.
Q. Then in how many car lengths?
A. I could stop them in 18 cars.
Q. In other words, you mean a length and a half of the train, whatever its size is?
A. Yes, sir; at that rate of speed.

JAMES COFFEE, a witness produced on behalf of defendant, having been duly sworn, testified as follows:

Direct examination (by Mr. McGEE):

Q. Where do you live?
A. Jersey City Heights.
Q. Were you in the employ of the D., L. & W. Railroad Company in March last?
A. Yes, sir.
Q. In what capacity?
A. Watchman.
Q. Where?

A. At Bergen Junction.
Q. Were you at Secaucus the night Dr. Converse was hurt?
A. Yes, sir.
Q. Where were you at the time the accident occurred?
A. In the depot.
Q. You did not see the thing happen, then?
A. No, sir.
Q. Did you hear anything before the accident?
A. O'Brien hollering.
195 Q. What did you hear him halloo?
A. I couldn't tell exactly—"Hold on! Stop!"—something like that.
Q. Loud?
A. Yes, sir.
Q. Then what did you do?
A. Well, I was sitting there and I just rose up out of my chair when he hollered, and he came to the door and said the doctor was struck by the cars.
Q. What did you do?
A. I took my lamp off the table and ran out down the track.
Q. And found the doctor in the buggy?
A. In the wreck; yes, sir.
Q. Now, after that was over did you make any observation as to whether there were any cars on the siding?

The COURT: Did he see whether there were any cars there?

A. There was no cars there.
Q. What I meant was did you look purposely—did you make any examination with that end in view?
A. Yes, sir.
Q. Where did you stand to look?
A. On the crossing.
Q. Whereabouts?
A. On that No. 1 track.
Q. Do you mean the one next to the county farm?
A. No; the second one.
—. ——.
A. Yes, sir.
196 Q. The one next to the east-bound track?
A. Yes, sir.
Q. Did you stand on the roadway?
A. Yes, sir.
Q. And you looked from there?
A. Yes, sir.
Q. How far could you see?
A. Quite a distance back, about as far as the coal bin.
Q. Do you mean the coal platform?
A. Yes, sir; what we call the coal bin.
Q. Do you know how far back it is; does it show on the map?
A. No; it ain't there.
Q. I know the coal bin itself isn't there, but is the place there?

A. Yes, sir.

Q. Were there any cars on the siding next the poor-house?

A. No, sir.

Q. Were there any next to it?

A. Not on the same line with the coal bin.

Q. Not in front of the coal bin, not nearer the crossing. Is that what you mean?

A. Yes, sir.

Q. Nothing on either of those tracks between that platform and the crossing?

A. No, sir.

Q. Tell us again on which track the coal bin was.

A. On the end of the first track next the county farm, what we call the poor-house track.

197 (By the COURT:)

Q. On the end of the first track as exhibited there (referring to map)?

A. No, sir.

(Further direct:)

Q. Nothing between that coal bin and the crossing on either of those tracks?

A. No, sir.

Q. How far is that coal bin from the crossing?

A. Maybe 100 or 150 feet, as far as I can judge.

Cross-examination (by Mr. VREDENBURGH):

Q. The second track from the county farm, what do you call that?

A. No. 1.

Q. How far is the first switch west of the county road from the county road?

A. The heel of the first switch, what we call the heel of the switch, is right at the end of the planks of the county-road crossing.

Q. Even closer than it is shown on the map here?

A. Well, that is the head block there.

Q. Well, that makes another track?

A. Yes, sir.

Q. Now, how far is the next switch?

A. Well, just clear of that again.

Q. Just as close as you could get it?

A. I would not be certain about that.

Q. How many feet is that?

A. Well, they don't generally put a switch very near a frog unless it is short ground and they cannot do any better.

198 Q. Can't you tell how far it is from the county road?

A. It may be 125 feet.

Q. 125 feet your judgment is (measuring on map). This drawing shows it to be less than 11 inches—about 110 feet that would be—now, that makes one railroad there?

A. Yes, sir.

Q. Another track?
A. Yes, sir.
Q. Now, how near is the next switch?
A. I could not tell you; I never measured it.
Q. I know, but we are asking your judgment.
A. Well, when they clear the frog of one they start another one.
Q. And that makes a third track?
A. Yes, sir.
Q. Now, how many are there of that kind?
A. Well, there are four there on that side, I believe. That is what they call long switches, No. 1, 2, 3, and 4.
Q. How many short switches are there there?
A. That poor-house switch they call the first one, and then the one that runs to the turn-table they call the turn-table switch—a very short track.
Q. How far is that from the crossing?
A. That is further on than the coal bin.
Q. Then when you get a distance of 150 feet or so there are some 8 different tracks before you come to the east-bound track?
A. No; not on that side.
199 Q. Well, there is four, you say, you mentioned four?
A. Yes, sir.
Q. And there is the track to the turn-table; that is five?
A. Yes, sir.
Q. And then there is this dead track—the poor-house track—six?
A. Yes.
Q. So that makes six tracks there on the west of the county road before you come to the east-bound track?
A. Yes, sir; there are two over the crossing.
Q. Yes; we have those two. Those tracks are used for storing cars?
A. I believe that is what they are put there for.
Q. And how long is the longest one of them?
A. Well, one runs from there to the Hackensack bridge.
Q. And the rest of them?
A. Well, there is three goes to the Hackensack bridge.

(By Mr. BEDLE:)

Q. Is the Hackensack river to the east or the west of the crossing?
A. Well, we call it west?

(Further cross:)

Q. How far is the Hackensack bridge from the crossing?
A. I should judge a mile.
Q. Then when you say you could see three miles down the track you mean you see through that bridge. What kind of a bridge is that?
A. There ain't no gallows to it; it is a level bridge with a wall-guard each side of it.
200 Q. About 8 feet high?

A. About that.
Q. Across the Hackensack river?
A. It is a sort of—like a fence, you know.
Q. Well, now, you say you found the Doctor?
A. Yes, sir.
Q. Whereabouts?
A. Lying between the east and west bound track, east of the crossing.
Q. How far east of the crossing?
A. About 40 feet.
Q. What condition was he in when you came there?
A. Well, he was in the wreck, among the spokes, and the blankets around his feet.
Q. Wreck of what?
A. Wreck of the carriage.
Q. What about the spokes?
A. He was in among the wreck there. There was not much of it left.
Q. But what was left was around the Doctor?
A. He was in there, sitting in it. I don't know exactly how it was fixed. The whole business was there.
Q. By the whole business you mean the Doctor?
A. No; he was sitting in there, in the wreck.
Q. Was the horse in the business?
A. The horse wasn't there.
Q. Did you help him up?
A. Yes, sir.
201 Q. He didn't get up until you helped him up?
A. The brakeman and I helped him up. I asked the Doctor if he was hurt.
Q. The Doctor then went towards the depot?
A. No, sir.
Q. How near did he go towards the depot?
A. He came into the gate-house with me. I took his robe and blanket and told the Doctor to come, and asked him if I could do anything for him.
Q. You went inside the gate-house—what is that?
A. Inside the county farm. I see it on the map—called the guard-house.
Q. Then where did you go?
A. I left him there. The Doctor was going to go with me, and I told the Doctor he had better not walk, and I would go up and do the best I could, and I went up towards the county-house.
Q. You are the man that met Mr. Fallon and Mr. Maxwell?
A. Yes, sir.
Q. And you left the Doctor standing there?
A. No; he and I walked back towards the depot over the crossing, but I did not see him go into the depot. There was a couple of men standing on the platform, and I told him to go in and I would do what I could.

Redirect examination:

Q. Where you found the Doctor—forty feet east of the crossing—from there to the guard-house, how did he go to the guard-house—by going to the crossing and thence to the guard-house or across the tracks?

202 A. He came up from where I found him to the crossing—over the crossing to the guard-house; but he didn't go into the guard-house; he stood at the bottom of the steps.

Q. What was the distance that he walked?

A. I don't know the distance.

Q. How many yards, about?

A. Well, it must be forty feet from where I found him until we came up to the crossing, and then you can judge by the map.

BARTLEY SHUSTER, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination (by Mr. MCGEE):

Q. What is your business?

A. Brakeman.

Q. Were you in the employ of the D., L. & W. Railroad Company at the time this accident occurred?

A. Yes, sir; I was.

Q. Were you on the train that the Doctor was hurt by?

A. Yes, sir.

Q. Which section were you on?

A. On the first section—the hind car of the first section.

Q. Are you the man that cut the train in two?

A. Yes, sir.

Q. Now, whereabouts did you cut it in two—how far from the crossing?

A. I should judge I cut it five or six cars from the crossing, but they did not go apart right away when I cut them.

203 Q. Well, when you crossed the crossing did you ride on on the first section?

A. Yes, sir.

Q. On the last car of it?

A. Yes, sir.

Q. How many cars were there in that section?

A. 12 cars in the head section.

Q. Where were you standing?

A. Standing down on the draw-head of the last car—just bending up.

Q. By draw-head you mean bumper?

A. Yes, sir.

(By the COURT:)

Q. The hind part of the car?

A. Yes, sir.

(Further direct:)

Q. You had been down there to draw out the pin?
A. Yes, sir.
Q. And you stood there on the bumper?
A. Yes, sir.
Q. A little frame down at the bottom of the box?
A. Down at the bottom.
Q. Did you have a light?
A. I had my lamp on my left arm.
Q. Was it lighted?
A. Yes, sir.
Q. Was there anybody on the top of that car?
A. No, sir; there was down ahead of it.
Q. I mean was there any man on the top of that car, or don't you know?

204 A. I don't know whether there was or not.

Q. Now, then, when you crossed the crossing, that part of the car on which you were went across the crossing, how far back was the other car?
A. I should judge about 3 cars away from it.
Q. When the cars went apart do you know where Quinn was?
A. Yes, sir; he was on the head car of the second section.
Q. What part of it—on top?
A. On the roof, he stood.
Q. Did he have anything in his hand?
A. Yes, sir; he had a lamp.
Q. Was it lighted?
A. Yes, sir; it was when I saw him.
Q. Did you see what he did?
A. No, sir; I didn't take notice after I went over the crossing.
Q. Did you see the accident?
A. No, sir; I did not.
Q. You were not looking?
A. No, sir; I had my back turned towards him, but I heard Jack hollering at him.
Q. Who is Jack?
A. Jack O'Brien.
Q. What did you hear him hollering?
A. "Hold on there."
Q. From where you were could you see the caboose lights?
A. Yes, sir.

Q. Which ones?

205 A. The side lights and top light.

Q. How far could you see around you independently of the lights?
A. Well, I could see about 150 feet or more; it wasn't very dark.
Q. Were there any lights in the depot?
A. Yes, sir; there was one light in the front of the depot.
Q. I mean inside, that you could see through the windows.
A. Yes, sir.

Cross-examination (by Mr. VREDENBURGH):

Q. I understand that the rear train—Mr. Quinn was on the rear portion of the last section?

A. Yes, sir.

(By the COURT:)

Q. The rear portion of the last?

A. (Not answered.)

(Further cross:)

Q. The rear end of the first car of the last section?

A. The first car of the last section.

Q. Was he the one that was to put on the brakes to control that section?

A. Yes, sir.

Q. Now, was there any one else to assist him in doing that?

A. Yes, sir; there was a man on the hind end.

Q. There was a man also on the hind end?

A. Yes, sir; not to assist him, though.

Q. What was he to do?

A. He was flagman.

206 Q. Well, Quinn was the sole one, then, to control that section of the train?

A. Yes, sir.

Q. Now, then, I understand you to say you cut this train.

A. Yes, sir.

Q. And you cut it about five cars from the crossing?

A. Five or six.

Q. Now, Mr. Quinn says that he did not put on the brake?

A. No, sir.

Q. He did not?

A. No, sir.

Q. Now, how did the front section get away from the rear section, then?

A. Well, after he got so far ahead (interrupted)——

Q. You cut it; now, then, how did the front section get away from the rear section if there was no brake put on the rear section?

A. There was a locomotive at the head end.

Q. The locomotive started up, then, and started up the whole train?

A. He used a little steam.

Q. Did he use only a little?

A. Very little.

Q. To start the section you were on?

A. Yes, sir.

Q. To get it away from the other section?

A. Not to get it away at all.

Q. Why, what is the object of cutting the train if it was

207 not to get the different parts of the train apart?

A. Oh, it is to get them apart.

Q. Now, then, I want to know—Mr. Quinn says he did not put on any brake?

A. No, sir; he did not.

Q. Now, then, what was it that pulled the two trains apart?

A. The engine.

(By the COURT:)

Q. I suppose you put on steam enough——

A. To go to the switch where he wants to put the cars in?

Q. And to go over faster than you would go by mere force of gravity; is that so?

A. Yes, sir.

(Further cross:)

Q. Now, then, how was it that between the time you got—you say you only put on a little steam, as I understand.

A. Yes, sir; very little.

Q. Now, then, how far were you from the rear train—the nearest part of the rear train—when you went over the crossing?

A. Well, I should judge about two cars and a half or three cars.

Q. Well, do you mean to say (interrupted)——

A. Not any more than 3.

Q. Do you mean to say that by putting on a little steam you could get in 5 lengths—five or six lengths of a car—you could get the distance from 2 to 3 car-lengths away from the rear section of that train?

208 A. Yes, sir; very easy when moving slow. It does not require a great deal of steam. The track is perfectly level.

Q. Your view of it is, then, that when you crossed the county road you were from 2 to 3 car-lengths ahead of the rear section?

A. Yes, sir.

(By Mr. BEDLE:)

Q. There is less weight, too, to carry as soon as the severance is made; less weight to the front section?

A. Yes, sir.

Recross:

Q. You said that the man on the rear end of the train was the flagman?

A. Yes, sir.

Q. Didn't he brake also?

A. Yes, sir; in case we wanted to stop quick.

Q. When you said he was not there to help Quinn what did you mean by that?

A. He was not there ahead to help him stop them.

Q. He did not have anything to do with the same brake that Quinn had?

A. No, sir.

Q. Did he have his own brake to manage?

A. Yes, sir.

Recross-examination:

Q. Were you standing on the draw-head, do I understand you to say?

A. Yes, sir; the draw-head of the rear car.

209 Q. Then how could you see the light in the caboose of the rear train?

A. I stood with one foot on the draw-head and looked out between the cars.

Q. I thought you said you stood on the draw-head.

A. Yes, sir.

Q. That is right in the middle of the car, isn't it?

A. Yes, sir.

Q. How could you see?

A. I had hold of the step-ladder; I took hold.

Q. Did you look to see whether you could see the light that night or not?

A. Yes, sir.

Q. You did try to see it?

A. Yes, sir; every night I have been on there long enough.

OTTO BOTTICHER, a witness, being produced on behalf of the defendant, being duly sworn, testified as follows:

Direct examination (by Mr. BEDLE):

Q. Are you one of the engineers of the D., L. & W. Railroad Company?

A. One of the civil engineers.

Q. And are you familiar with the height of ordinary coal cars—what is called gondola coal cars?

A. Yes, sir.

Q. What is the height of an ordinary coal car from the rail?

A. About 7 feet.

210 Q. What is the height of one of those gondolas?

A. About 8 feet.

Q. And what is the height of an ordinary box or freight car, as it is called?

A. Between 11 and 12 feet.

Q. And what is the height of the caboose?

A. The caboose is about 13½ feet—the top of the caboose, the extreme top.

Q. Can you tell us how far the switch on the east-bound track east of the crossing, south of the crossing—I will assume that that is the switch (indicating), although the map is cut in two. Now, the switch that the head section intended to take that night—you heard the testimony, didn't you?

A. Yes, sir.

Q. Where is that switch? What is the distance of that switch from the crossing, if you can tell?

A. About 300 feet.

Q. Are you speaking with accuracy or from judgment?

A. Judgment.

Q. Have you measured it upon the ground at all?

A. I have got some notes here that will give it to us accurately.

Q. Won't you give it to us accurately?

A. This is the switch, as I understand it, from the east-bound track and the west-bound track.

Q. No; the switch from the east-bound track across the west-bound track to get into the yard.

211 A. That switch is 1,100 feet from the center of the crossing.

Q. Which is the switch that is laid down on that map, if at all?

A. The furtherest one to the right. That is the one I have reference to (indicating).

Q. Is that the switch that this first section was to go into that night, as you understand the testimony?

A. As I understand it, yes.

Q. And that is 1,100 feet from the crossing?

A. 1,100 feet.

Q. Is that land which is used for storing cars made land, filled up?

A. Yes, sir.

Cross-examination by Mr. VREDENBURGH:

Q. The grade of these side tracks, No. 1, as it is called, how much is that grade above the level of the easterly-bound track?

A. Probably a few inches.

Q. Do you know how much it is?

A. I could not say positively. There may be a difference of a few inches between the main track and the sidings.

Q. You were speaking of the height of gondola cars. I want to know the height of the high-side gondola cars.

A. The latest ones are about 9 feet.

Q. The high-sided ones about 9 feet?

A. Yes, sir.

Q. Do you speak of that by guess-work? You measured the 8 foot but have not measured the high-sided ones?

212 A. No, sir; I have not measured the high-side ones.

WILLIAM ELMER, Jr., a witness produced on behalf of defendant, being duly sworn, testified as follows:

Direct examination (by Mr. BEDLE):

Q. Are you a practicing physician and surgeon in Trenton?

A. Yes, sir.

Q. And have been such for quite a number of years here?

A. 17 years in Trenton.

Q. I ask you as to the effect of shocks. You saw Doctor Converse here. If any results remained of shock would it be visible now?

A. I should judge from an injury of that character that whatever evidences of shock were apparent would be apparent now.

Q. And his condition of arm and shoulder and the effect of it. You may state whether it would be as bad now as it would likely ever be.

A. I should think so.

Q. And the chances for the future; what are they—the chances for the future as to improvement?

A. They would be no worse. If there was any change at all it would probably be for the better. I take that on the assumption that the fracture is complete; that there is sound union.

Q. That there is sound union?

A. Yes, sir.

213 Cross-examination (by Mr. VREDENBURGH):

Q. Just a word with regard to shock. Is it true that where there is what is termed a shock that there are always evidences, external evidences, of that shock?

A. Not external; the evidences of shock are generally internal, but the results of them would be apparent by this time.

Q. Well, are there cases in which—resulting from railroad accidents—the shock will be felt many months afterwards?

A. More especially in spinal injuries. In fractures of the extremities it is not likely to be so.

Q. That is all, sir.

Defendants rest.

Doctor KING recalled on behalf of plaintiff in rebuttal.

Direct examination (by Mr. VREDENBURGH):

Q. Doctor King, Mr. O'Brien says that he heard a conversation between you and the Doctor, and he states that something was said at that time about this horse that the Doctor was driving; that is the conversation I had reference to. Will you state what was said in that conversation?

Objected to.

The COURT: Your question properly is, "Did he or did he not?" and when that question is answered I will determine whether he can give the conversation.

Q. Did Doctor Converse say to you that he was driving a strange horse and could not control him? Did he say any such thing?

214 A. No, sir.

(By the COURT:)

Q. Or words to that effect?

A. No, sir.

Q. Anything like it?

A. Positively he did not, sir.

The COURT: That is enough.

Cross-examination (by Mr. BEDLE):

Q. Do you mean to say anything more than that you did not hear it?

A. No; I am positive that he did not say so.

Q. You will go to that extent?
A. Yes, sir.

CHARLES B. CONVERSE recalled on rebuttal on his own behalf.

Direct examination (by Mr. VREDENBURGH):

Q. Doctor, you heard what Mr. O'Brien said you said as to a strange horse and your inability to hold that horse?
A. I heard what he said.
Q. Did you say any such thing to Doctor King?
A. I did not, either to Doctor King or anybody else.
Q. One of their witnesses says that you went—he assisted you up and you together walked from the crossing to the guard-house.
A. Towards the guard-house.
Q. Towards the guard-house, and then he left you, or then he walked back almost to the depot with you and left you. What did you do between the time he left you and the time that Fallon came to you?
215 A. I think Fallon came immediately.
Q. Well, at that time, Doctor, when you were walking back, did you notice these cars?

The COURT: He has been over all that.

Q. Doctor, did you know that they ever made running switches across that county road prior to that night?

Objected to. Objection overruled. Exception taken.
To which ruling the defendants by their counsel excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

A. I was not aware of it.

Cross-examination (by Mr. BEDLE):

Q. You told Doctor King, didn't you, there that night that you had a strange horse?
A. I told him I had another horse; I did not have my horse.
Q. Why did you tell him that?
A. He asked me in regard to my horse; asked me what became of my horse.
Q. What did you tell him?
A. I told him I didn't have my horse.
Q. What else did you tell him?
A. I don't remember that I told him anything else.
Q. You meant to convey the idea that it was a different horse from what you usually drove?
A. That it was not my horse.
216 Q. You heard my question?
A. Yes, sir.
Q. You meant to convey the idea that it was a different horse from what you usually drove?
A. Yes, sir.

STEWART recalled in rebuttal on behalf of plaintiff.

Direct examination (by Mr. VREDENBURGH):

Q. Mr. Stewart, did Mr. O'Brien tell you that night what speed, in his judgment, that train that hit the doctor was moving at the time it hit him?

Objected to as immaterial and that upon cross-examination they are bound by it. Objection overruled. Exception taken.

To which ruling the defendants, by their counsel, excepted, and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

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A. Yes; he said about 16 miles an hour positively.

(By the COURT:)

Q. What train?

A. The train that struck the doctor.

Q. Did he say to you what he did when he saw that the accident was about to occur?

A. Yes, sir.

Q. What did he say he did?

A. He told me and a gentleman that was with me—says he, "I could not bear to see it. I turned and went into the depot, and when I returned I was surprised to see the doctor taken out
217 alive." Those are the words he told me on that crossing, where I was looking for the doctor's revolver.

Cross-examination (by Mr. BEDLE):

Q. Now, can't you give the conversation in which the expression "16 miles an hour" was used? Was that in answer to something you said?

A. We were talking about how the doctor was struck. He was showing us where he was struck with a lantern, and the horse's marks where the horse was trying to hold on, where he was drug along, and that brought out this conversation.

Q. When he came to speak of 16 miles an hour can you tell whether that was in reply to anything you asked him or not or whether it was an independent remark made by him?

A. I don't recollect whether it was an independent remark, but it was during that conversation that remark came out.

Q. And you got the impression that that referred to the second section of the train?

A. To the train; yes, sir.

Q. To the second section?

A. To the second section.

BRADY recalled in rebuttal on behalf of the plaintiff.

Direct examination (by Mr. VREDENBURGH):

Q. Mr. Brady, did you hear Mr. O'Brien say how fast that train was running that hit the doctor?

A. Yes, sir.

218 Q. What did he say?

A. He said it was lucky it was going as fast as it was, about 16 miles an hour. I asked him how fast it was going, and he said about 16 miles.

Q. Did he say to you what he did when he saw the accident would occur?

A. He said as soon as he seen the Doctor was to be hit he turned his back and went into the station; said he could not bear to see him; expected to see him ground up.

Cross-examination (by Mr. BEDLE):

Q. You asked him how fast it was going?

A. He made the remark it was lucky for the doctor that the train was going as fast as it was; if it was going any slower he would be killed. I asked how fast it was going, and he said about 16 miles an hour.

Q. That who would be killed?

A. The Doctor.

Plaintiff rests.

Case closed.

Adjourned till Thursday, the 28th day of October, 1886, at 9.30 a. m.

219 *Charge of Judge Butler to the Jury.*

TRENTON, *October 28th*, 1886.

GENTLEMEN OF THE JURY: The defendant has asked the court to charge you on a number of points with a view of getting the defendant's understanding of the law in the case before you, and I will do so at the outset.

1. The court is asked to charge first: The rule of responsibility on the part of the company to the plaintiff is ordinary care; that that is the degree as distinguished from the degree of care with reference to passengers; that the rule in this case is the rule of ordinary care.

The court answers that the defendant was bound to the observance of great care; that "ordinary" care, in the sense here intended, is such care as I have just stated, though it is not that degree of care which is due to passengers on trains.

2. The court is asked to charge second: The plaintiff owed also a duty to the company to exercise ordinary care in crossing the tracks. In addition to that counsel for def'ts asks that the charge be to this effect: That the law has imposed upon the citizen the duty of exercising the highest practical degree of care in avoiding danger to himself and possible injury likely to be caused by collision with or obstruction of trains.

The court answers that the plaintiff was bound to exercise the same degree of care to avoid collision with trains which I
220 have stated to be due the plaintiff from the defendant—great care.

3. The court is asked to charge: If there was no want of ordinary care on the part of the company in the management of the train in question there can be no recovery by the plaintiff.

The court answers: That it cannot so charge inasmuch as it finds from the admitted facts of the case that the defendant was guilty of negligence.

4. The court is asked to charge if the jury should believe from the evidence that there was a want of ordinary care on the part of the company in the management of the train, still that would not entitle the plaintiff to a recovery if the jury should also believe from the evidence that the plaintiff contributed to the injury by a want of ordinary care on his part.

The court answers: This is a correct statement of the law, and the jury is so charged.

5. The court is asked to charge that the law does not measure the degree of contributory carelessness on the part of the plaintiff, if the want of ordinary care on his part contributed to the injury that will defeat any recovery by the plaintiff.

The court answers: This is so, and the jury is so charged; that is involved in what was said before.

6. The court is asked to charge: If the jury believe the evidence of Quinn as to the fact of his having a light at the time of the cutting of the train, and that the same was blown out under the
221 circumstances related by him, and that the injury was occasioned by the want of such light, then the jury would be justified in finding that the injuring was an inevitable accident from which no action arises to the plaintiff.

The court answers: This point cannot be affirmed; the court cannot so charge.

7. The court is asked to charge: The jury have no right to pass upon the fact of the absence of a flagman in this case as bearing upon the question of want of care on the part of the defendant.

8. The fact of the ringing of the bell and the blowing of the whistle of the locomotive to the train, under the statute referred to by counsel for pl't'f, whether done or not, has no bearing upon the question of care on the part of the def't.

The court answers: I will answer the two points together. The statute is not applicable to the facts of this case, but in the view the court takes of the def't's conduct the point is immaterial.

9. The court is asked to charge: If the jury believe that Dr. Converse, by the use of reasonable care, could have seen the approaching section of the train at any point before going on the track, so as to avoid injury, the jury could find contributory negligence.

The court answers: This is affirmed. It is correct.

10. The court is asked to charge: If the jury believe that when Dr. Converse heard the cries that they arrested his attention so as to create the thought of danger to himself, and could have
222 avoided danger by halting or stopping, the jury could find that he is guilty of contributory negligence.

The court answers: I shall answer that and the two following points together.

11. The court is asked to charge: If the jury believe that when the Dr. heard cries he was thereby brought to a mental consideration of the subject of danger, and then without further investigation concluded to go ahead, and the accident was made possible by that mistake, he cannot recover.

12. The court is asked to charge: If the jury believe that when the doctor heard cries he was thereby brought to a mental consideration of the subject of danger, and then without further consideration concluded to go ahead, and the accident was made possible by that mistake, the jury would be justified in finding contributory negligence on his part.

To these three points on the same subject the court answers: If the cries excited apprehension or thought of danger to himself in the plaintiff's mind before he got upon the tracks he should have looked for the source of danger, and if he then saw the approaching train he should have stopped. If he had understood that the cries were intended to warn him of an approaching train in his front he should at once have stopped.

GENTLEMEN OF THE JURY: The plaintiff sues to recover damages for injuries sustained, as he alleges, through carelessness of
223 the defendant, the railroad company.

To entitle him to recover he must show that the defendant was guilty of carelessness, and that his injury or injuries resulted from this cause. If he has succeeded in doing this he is entitled to your verdict, unless it further appears from the evidence that he (the plaintiff) also was guilty of negligence which contributed to the accident, consequent injury. It is a well-settled rule of law that where a plaintiff claiming damages for injuries sustained in a case such as this on trial has himself been guilty of negligence which contributed to the accident complained of he cannot recover, notwithstanding he may show negligence on the part of the defendant. Inasmuch as it is impossible in such case to ascertain what proportion of the result is attributable to the negligence of the defendant, the law forbids a recovery for any part of the damage sustained.

Thus you observe the case presents three questions: 1st, was the defendant guilty of negligence on the occasion complained of? 2nd, was the plaintiff also guilty of negligence contributory to the accident?

If these questions are both decided in the plaintiff's favor—that is, if it is found that the defendant was guilty of negligence, and that the accident resulted from this cause alone, not being contributed to by negligence of the plaintiff—then your verdict must be for the plaintiff, and then the third question will arise, to wit: What was the extent of his injuries and how much compensation should
he receive?

224 Addressing ourselves to the first question, Does the evidence show the defendant to have been guilty of negligence? the defendant was at the time engaged in operating or performing what is called a "running or flying switch." Having brought a train of some twenty-five burdened cars from the westward to a point

within a short distance of the public road on which the plaintiff was driving, it there severed the train near the centre, and with the twelve forward cars attached to the engine ran across the public road when the plaintiff was approaching the crossing, leaving the remaining thirteen cars to follow by the force of gravity some distance behind, crossing the public road about ninety feet in the rear, and running over the plaintiff and his vehicle, seriously injuring the former and breaking up and destroying the latter. This act of running the train of thirteen cars across the public highway in the manner described by the witnesses constitutes the alleged carelessness complained of by the plaintiff. Was this act careless—a disregard of the defendant's duty to persons travelling on the public highway? It is the plain duty of all railroad companies employing locomotive engines and trains to approach grade crossings of public highways with great care, to warn travellers upon such highways of their approach, and the consequent necessity of avoiding the railroad tracks. Guards or flagmen must be stationed and kept at such points or signals by bell or whistle (or other efficient means) must be em-
225 ployed to warn such travellers of approaching trains in time to avoid danger. Did the defendant discharge this duty on the occasion referred to? If it did not it was guilty of carelessness. The cars detached, thirteen in number, running a distance of ninety feet in the rear of those which crossed the highway in front of the plaintiff, must be regarded as constituting a train in the sense above referred to. To call them a section of the train in advance signifies nothing important to the case.

Running thus separately, they were just as dangerous to travellers on the highway as if they had never been attached to the train in advance, and there was, therefore, the same necessity that their approach should be heralded or signaled in some efficient manner.

There was no such heralding or signalling of any description, no guard or flag, no sounding of bell or whistle, and I therefore instruct you that the defendant failed in its duty in this regard, and consequently was guilty of carelessness. The circumstances that there were lights on the rear car, and had been a light on the front car, which was blown out a short distance back from the highway, did not relieve the defendant from his obligation to give the ordinary or some other proper warning.

This method of operating "running or flying switches" in the vicinity of and across public highways, whereby detached portions of trains approach and cross without engines and without signals or warnings, has been severely commented on by the courts, and
226 in several instances pronounced to be a plain disregard of duty to travellers upon such highways. (See Thompson on Negligence, page 423; Beach on Contributory Negligence, 223; Brown *vs.* Railroad Companies, vol. 5, court of appeals, New York; Grevy *vs.* R. R. Co., Ill. R., page 83.)

We have thus found as matter of law from the admitted or uncontroverted facts that the defendant was guilty of carelessness, and will therefore now pass to the second question: Was the plaintiff also guilty of carelessness which contributed to the accident? While, as

we have seen, it is the duty of the railroad companies to exercise great care to warn travellers on the public highways of approaching trains, it is an equally imperative duty in such travellers to exercise the same degree of care to avoid and keep off the railroad tracks when trains are approaching and crossing.

If the plaintiff advanced to and upon the tracks of the railroad without the exercise of such care to detect the approach of trains, or attempted intentionally to pass in front of a train within dangerous proximity, he was guilty of negligence; otherwise he was not. It was his duty, when at a safe distance from the tracks, where the opportunity of seeing was best, to stop, look up and down the road, and listen for trains. I repeat that it was his duty to look and listen, and also, in view of the net-work of tracks and the especially dangerous character of the crossing there, to stop so that he might listen most advantageously.

227 If he did not do this (stop and look and listen) he was guilty of carelessness. Did he do it? He tells you he did. You have heard what O'Brien has said on the same subject, and will determine whether the plaintiff did or did not so stop and look and listen. He swears very positively that he did. Is there anything to justify a belief that he did not?

If, after crossing the first or second track, the plaintiff should, by the exercise of such care as I have described, have discovered the approach of the train which struck him, he was guilty of carelessness in not discovering it and stopping short of the east-bound track.

You must judge of the plaintiff's opportunity of seeing whether standing cars were in the way; whether, if they were, he could have seen over them by standing up in his carriage. If he could he should have stood up. Of all this you must judge.

O'Brien called, "Look out," or something to this effect, and was heard by the plaintiff.

The plaintiff tells you, however, that he did not understand this call as addressed to him, but supposed it to be addressed by one railroad man to another; that he saw no danger; did not see the approaching train in the darkness and drove on.

Do you find from the evidence that the plaintiff was guilty of contributory negligence? In passing upon this important question you must bear in mind all the circumstances—the condition of

228 things in the vicinity of the point where the accident occurred at the time; and you should also bear in mind and consider the comments of counsel.

If you find the plaintiff was guilty of negligence he cannot, as I have before said, recover. If you do not so find (that is, do not find him here to have been guilty of negligence) he is entitled to your verdict. In this event it will be your duty to award him a sum sufficient to compensate for the pain and suffering he endured, the loss of time while unable to pursue his business, the necessary expenses he incurred while sick, and for any temporary or permanent disablement or impairment of strength and health which you may find he has sustained, as also for the loss of his wagon and injury to

the horse. In ascertaining the amount of compensation if you reach this point you will be careful to avoid extravagance. The plaintiff should be fully compensated if he is entitled to your verdict. That is his right, but it would be unjust to give him more. It would be a violation of your duty to give him more. The case should be considered as if the suit was between private individuals and be decided strictly upon its merits as exhibited by the evidence. To indulge any prejudice against the defendant because it is a corporation or sympathy for the plaintiff and allow this to influence your verdict would be grossly unjust. You must take the case and decide it.

The jury then retired.

229 Gov. BEDLE: If the court please, we respectfully ask an exception to the qualification of the first request to charge. Perhaps we had better put it in the shape for not charging, as requested and as charged.

The third request your honor declined to charged. I pray an exception to that.

The sixth request, in regard to the evidence of Quinn, your honor did not charge. I pray an exception to that.

The seventh and eighth requests the court dealt with, as I understand, together. We ask an exception to the declination of the court to charge as requested and as charged with reference to it.

Your honor dealt with the tenth, eleventh, and the twelfth requests together, and we ask an exception to the declination to charge each of these requests as asked and to the charge as made with reference to them.

Then on the question of the negligence of the defendant, taking control of that as a matter of law, I respectfully ask an exception to that portion of your charge as to the negligence of the defendant and your honor taking control of it as a matter of law.

I think that covers it. If in any substantial thing that I have omitted I desire to ask an exception and your honor is satisfied I can pray further exceptions, I suppose.

The court granted the exceptions prayed by counsel for the defendant.

230 At the trial of said cause the said defendants, by their counsel, requested the said judge to charge the jury that the rule of responsibility on the part of the company, the defendants, to the plaintiff is ordinary care; that that is the degree as distinguished from the degree of care with reference to passengers; that the rule in this case is the rule of ordinary care.

But to so charge the said judge refused, and did charge as follows:

The court answers that the defendant was bound to the observance of great care; that "ordinary" care in the sense here intended is such care as I have just stated, though it is not that degree of care which is due to passengers on trains.

To which refusal to charge as requested, and to what the said judge did charge in reply to said request, the defendants, by their

counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

At the trial of said cause the said defendants, by their counsel, further requested the said judge to charge the jury that if there was no want of ordinary care on the part of the company in the management of the train in question there can be no recovery by the plaintiff.

But to so charge the said judge refused, and did charge as follows:

231 The court answers that it cannot so charge, inasmuch as it finds, from the admitted facts of the case, that the defendant was guilty of negligence.

To which refusal to charge as requested and to what the said judge did charge in answer to said request the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

At the trial of said cause the said defendants, by their counsel, further requested the said judge to charge the jury—

That if the jury believe the evidence of Quinn as to the fact of his having a light at the time of the cutting of the train, and that the same was blown out under the circumstances related by him, and that the injury was occasioned by the want of such light, then the jury would be justified in finding that the injury was an inevitable accident, from which no action arises to the plaintiff.

But to so charge the said judge refused.

To which refusal to charge as requested the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

232 At the trial of said cause said defendants, by their counsel, further requested the said judge to charge the jury—

That the jury have no right to pass upon the fact of the absence of a flagman in this case as bearing upon the question of want of care on the part of the defendants.

But to so charge the said judge refused, and did charge as follows: The statute is not applicable to the facts of this case, but in the view this court takes of the defendants' conduct the point is immaterial.

To which refusal to charge as requested and to what the said judge did charge in answer to said request the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

At the trial of said cause the defendants, by their counsel, further requested the said judge to charge the jury—

That the fact of the ringing of the bell and the blowing of the

whistle of the locomotive to the train, under the statute referred to by the counsel for plaintiff, whether done or not, has no bearing upon the question of care on the part of the defendants.

But to so charge the said judge refused, and did charge as follows: The statute is not applicable to the facts of this case, but in the view this court takes of the defendants' conduct the point is immaterial.

233 To which refusal to charge as requested and to what the said judge did charge in answer to said request the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

At the trial of said cause the defendants, by their counsel, further requested the said judge to charge—

That if the jury believe that when Dr. Converse heard the cries that they arrested his attention so as to create the thought of danger to himself, and that he could have avoided danger by halting or stopping, the jury could find that he was guilty of contributory negligence, and also that if the jury believe that when the doctor heard cries he was thereby brought to a mental consideration of the subject of danger and then without further investigation concluded to go ahead and the accident was made possible by that mistake he cannot recover.

But to so charge the said judge refused, and did charge in answer to both requests as follows:

"If the cries excited apprehension or thought of danger to himself in plaintiff's mind before he got upon the tracks he should have looked for the source of danger, and if he then saw the approaching train he should have stopped. If he had understood that the cries were intended to warn him of an approaching train in his front he should at once have stopped."

234 To which refusal to charge as requested and to what the said judge did charge in answer to said two requests the defendants, by their counsel, excepted and prayed that this the bill of exceptions might be sealed, and it is sealed accordingly.

——— ———. [SEAL.]

At the trial of said cause the said judge, in charging the jury, said:

"The cars detached, thirteen in number, running a distance of ninety feet in the rear of those which crossed the highway in front of the plaintiff must be regarded as constituting a train in the sense before referred to (*pro ut* the charge). To call them a section of the train in advance signifies nothing important to the case. Running thus separately, they were just as dangerous to travellers on the highway as if they had never been attached to the train in advance, and there was, therefore, the same necessity that their approach should be heralded or signaled in some efficient manner."

To which charge the said defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

At the trial of said cause the said judge, in charging the jury, further said:

"There was no such heralding or signaling of and description—no guard or flag, no sounding of bell or whistle; and I there-
235 fore instruct you that the defendant failed in its duty in this regard, and consequently was guilty of carelessness."

To which charge of the said judge the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

At the trial of said cause the said judge, in charging the jury, further said:

"The circumstance that there were lights on the rear car and had been a light on the front car, which was blown out a short distance back from the highway, did not relieve the defendant from its obligation to give the ordinary or some other proper warning."

To which charge of the said judge the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

At the trial of said cause the said judge, in charging the jury, further said:

"We have thus found" (*pro ut* the charge) "as matter of law from the admitted or uncontroverted facts that the defendant was guilty of carelessness."

To which charge of the said judge the defendants, by their counsel, excepted and prayed that this their bill of exceptions might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

236 At the trial of said cause the said judge, in submitting the case to the jury, took control of the question of negligence on the part of the defendants as a matter of law and directed the jury that the defendants were guilty of negligence.

To which direction of the said judge the defendants, by their counsel, excepted and prayed that this their bill of exception might be sealed, and it is sealed accordingly.

WM. BUTLER. [L. S.]

237 Supreme Court of the United States, of the October Term, in the Year of Our Lord One Thousand Eight Hundred and Eighty.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Plaintiffs in Error,
vs.
CHARLES D. CONVERSE, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States,

at the Capitol, in the city of Washington, come the said The Delaware, Lackawanna and Western Railroad Company, by Joseph D. Bedle, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. That the judge who tried said cause at the circuit, at the trial thereof, ruled out legal evidence offered by the defendants, by which rejection the defendants were injured.

238 2. That at the trial of said cause at the circuit the said judge who tried said cause, at the trial thereof, admitted illegal evidence offered by the plaintiffs and objected to by the defendants, to the injury of the defendants.

3. That at the trial of said cause at the circuit the said judge permitted counsel of the plaintiff, against the objection of the defendants, to ask of the witness, John Grimes, the question, "You remember this highway for how long," which admission was illegal and to the injury of the defendants.

4. That at the trial of said cause at the circuit the said judge, in answer to the question mentioned in the last assignment of error, permitted the said witness, against the objection of the defendants, to answer said question as follows: "Well, I have been over that highway in 1857;" which admission was to the injury of the defendants.

5. That at the trial of said cause at the circuit the said 239 judge admitted in evidence, against the objection of the defendants and to their injury, that part of the revised statutes of New Jersey in which it is provided that trains crossing any crossing shall either ring the bell or — whistle a certain distance from the crossing.

6. That at the trial of said cause at the circuit when the plaintiff had rested his case the defendants, by their counsel, moved for a judgment of nonsuit in said cause against the plaintiff and in favor of the defendant; to grant which motion the said judge refused and permitted the cause to go to the jury.

7. That at the trial of said cause at the circuit the defendants, by their counsel, offered to show by the witness, John O'Brien, that the plaintiff went on the night in question to the county farm, and that there was at that time a coal train standing on the east-bound track, with the caboose on the road-crossing, and that the plaintiff, instead of waiting for the caboose to pass, went off towards 240 the west, out of the road, over the railroad track, where there was no railroad crossing; which evidence the said judge refused to receive, to the injury of the defendants.

8. That at the trial of said cause at the circuit the said judge permitted the plaintiff's counsel, against the objection of the defendants and to their injury, to ask the plaintiff, when a witness, the following question: "Doctor, did you know that they ever made running switches across that county road prior to that night?"

9. That at the trial of said cause at the circuit the said judge permitted the plaintiff's counsel, against the objection of the defendants and to their injury, to ask the witness, John W. Stewart, the following question: "Mr. Stewart, did Mr. O'Brien tell you that night

what speed, in his judgment, that train that hit the Doctor was moving at the time it hit him?"

10. That the said judge at the trial of said cause at the
241 circuit refused to charge the following request on the part of the defendants, to wit: "That the rule of responsibility on the part of the company (the defendants) to the plaintiff is ordinary care; that that is the degree as distinguished from the degree of care with reference to passengers; that the rule in this case is the rule of ordinary care;" but did charge as follows: "The court answers that the defendant was bound to the observance of great care; that 'ordinary' care in the sense here intended is such care as I have just stated (*pro ut* the bill of exceptions), though it is not that degree of care which is due to passengers on trains."

11. That the said judge at the trial of said cause at the circuit refused to charge the following request on the part of the defendants, to wit: "That if there was no want of ordinary care on the part of the company in the management of the train in question there can be no recovery by the plaintiff;" but did charge as follows: "The court answers that it cannot so charge, inasmuch as it finds
242 from the admitted facts of the case that the defendant was guilty of negligence."

12. That the said judge at the trial of said cause at the circuit refused to charge the following request on the part of the defendants, to wit: "That if the jury believe the evidence of Quinn as to the fact of his having a light at the time of the cutting of the train, and that the same was blown out under the circumstances related by him, and that the injury was occasioned by the want of such light, then the jury would be justified in finding that the injury was an inevitable accident from which no action arises to the plaintiff."

13. That the said judge at the trial of said cause at the circuit refused to charge the following request on the part of the defendants, to wit: "That the jury have no right to pass upon the fact of the absence of a flagman in this case as bearing upon the question of want of care on the part of the defendants;" but did charge as follows: "The statute is not applicable to the facts of this case,
243 but in the view this court takes of the defendant's conduct the point is immaterial."

14. That the said judge at the trial of said cause at the circuit refused to charge the following request on the part of the defendants, to wit: "That the fact of the ringing of the bell and the blowing of the whistle of the locomotive to the train, under the statute referred to by counsel for plaintiff, whether done or not, has no bearing upon the question of care on the part of the defendants;" but did charge as follows: "The statute is not applicable to the facts of this case, but in the view this court takes of the defendants' conduct the point is immaterial."

15. That the said judge at the trial of said cause at the circuit refused to charge the following request on the part of the defendants, to wit: "That if the jury believe that when Dr. Converse heard the cries that they arrested his attention so as to create the thought of danger to himself, and that he could have avoided danger by

244 halting or stopping, the jury could find that he was guilty of contributory negligence, and also that if the jury believe that when the Doctor heard cries he was thereby brought to a mental consideration of the subject of danger and then without further investigation concluded to go ahead and the accident was made possible by that mistake he cannot recover;" but did charge in answer to both requests as follows: "If the cries excited apprehension or thought of danger to himself in plaintiff's mind before he got upon the tracks he should have looked for the source of danger, and if he then saw the approaching train he should have stopped. If he had understood that the cries were intended to warn him of an approaching train in his front he should at once have stopped."

16. That the said judge at the trial of said cause at the circuit charged the jury as follows: "The cars detached—thirteen in number—running a distance of ninety feet in the rear of those
245 which crossed the highway in front of the plaintiff, must be regarded as constituting a train in the sense before referred to (*pro ut* the charge). To call them a section of the train in advance signifies nothing important to the case. Running thus separately they were just as dangerous to travellers on the highway as if they had never been attached to the train in advance, and there was therefore the same necessity that their approach should be heralded or signalled in some efficient manner."

17. That the said judge at the trial of said cause at the circuit charged the jury as follows: "There was no such heralding or signalling of any description, no guard or flag, no sounding of bell or whistle, and I therefore instruct you that the defendant failed in its duty in this regard, and consequently was guilty of carelessness."

18. That the said judge at the trial of said cause at the cir-
246 cuit charged the jury as follows: "The circumstance that there were lights on the rear car and had been a light on the front car, which was blown out a short distance back from the highway, did not relieve the defendant from its obligation to give the ordinary or some other proper warning."

19. That the said judge at the trial of said cause at the circuit charged the jury as follows: "We have thus found" (*pro ut* the charge) "as matter of law, from the admitted or uncontroverted facts, that the defendant was guilty of carelessness."

20. That the said judge at the trial of said cause at the circuit, in submitting the case to the jury, took control of the question of negligence on the part of the defendants as a matter of law, and directed the jury that the defendants were guilty of negligence, *pro ut* the charge.

21. That the verdict in said cause was in favor of the plain-
247 tiff, whereas, by the law of the land, it ought, under the facts of the case, to have been for the defendants.

22. That judgment below was entered in said cause in favor of the plaintiff, whereas, by law, it ought to have been entered in favor of the defendants.

23. That the judgment below is in divers other respects erroneous.

Therefore the said The Delaware, Lackawanna and Western Rail-

road Company pray that the judgment aforesaid, by reason of the errors aforesaid, may be reversed, annulled, and for nothing holden, and that they may be restored to all things which they have lost by occasion of the said judgment.

J. D. BEDLE,
Attorney for Plaintiffs in Error.

248 [Endorsed:] 6 64 Supreme Court of the United States. In case, on error to U. S. circuit court, dist. of New Jersey. The Delaware, Lackawanna and Western Railroad Company, pl'ffs in error, *vs.* Charles B. Converse, def't in error. Assignment of errors. J. D. Bedle, att'y of pl'ffs in error. Filed Dec. 27, 1886. S. D. Oliphant, clerk.

249 UNITED STATES OF AMERICA, } *ss.:*
District of New Jersey, }

I certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the district of New Jersey, in the third circuit, in a certain suit at law therein lately pending between Charles B. Converse, plaintiff, and The Delaware, Lackawanna and Western Railroad Company, defendants.

In testimony whereof I hereto subscribe my name and affix the seal of the said circuit court, at Trenton, in said district, this seventh day of October, A. D. 1887, and in the one hundred and twelfth year of the Independence of the United States.

The Seal of the U. S. Circuit Court., Dist. of New Jersey.

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: New Jersey C. C. U. S. No. 228. The Delaware, Lackawanna and Western Railroad Company, plaintiff in error, *vs.* Charles B. Converse. Filed October 14, 1887.

Office Supreme Court, U. S.
FILED,
MAR 7 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE

UNITED STATES.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Pltff. in Error,

vs.

CHARLES B. CONVERSE,

Deft. in Error.

In Error to the Circuit Court of the United States for District of New Jersey.

No. 228.
October Term, 1890.

Brief of

JOSEPH D. BEDLE,

Counsel for Plaintiff in Error.

The Argus Print, 44 Montgomery St., Jersey City, N. J.

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J. D. BEDLE,
Attorney for Plaintiffs in Error.

248 [Endorsed:] 6-64. Supreme Court of the United States. In case, on error to U. S. circuit court, dist. of New Jersey. The Delaware, Lackawanna and Western Railroad Company, pl'ffs in error, *vs.* Charles B. Converse, def't in error. Assignment of errors. J. D. Bedle, att'y of pl'ffs in error. Filed Dec. 27, 1886. S. D. Oliphant, clerk.

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Brief of

JOSEPH D. BEDLE,

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SUPREME COURT

OF THE

UNITED STATES.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Pltff. in Error,* *vs.* CHARLES B. CONVERSE, *Deft. in Error.*	In Error to the Circuit Court of the United States for District of New Jersey. No. 228. October Term, 1890.

BRIEF OF JOSEPH D. BEDLE, FOR PLAINTIFF IN ERROR.

STATEMENT.

The action was for personal injuries to Charles B. Converse, the plaintiff below, in being hit March 13, 1886, by the cars of the Delaware, Lackawanna and Western Railroad Company, in crossing the Boonton Branch of that company at Secaucus Station, in the County of Hudson, New Jersey. The verdict was for $14,000 damages, but the same was reduced to $7,500 by the plaintiff, the excess over that sum being remitted by the plaintiff after a decision by the court on a rule to show cause, that the verdict was extravagant.

The proceedings in this respect are on pages 13 and 14 of the case. Judgment was accordingly entered for the said sum of $7,500, besides costs, and that judgment is here now upon writ of error. The accident occurred about ten minutes after eight o'clock in the evening. The railroad was constructed across a vast stretch of salt meadow or swamp land two or three miles in width. The locality at and about the station was chiefly, if not entirely, used for the temporary stoppage of coal and other freight cars for distribution on the road. It was not a station for the loading and unloading of cars, but a place where the company would store its loaded freight cars for the time being, divide up the trains, and then take them to the terminal. There is a public road which crosses the tracks of the company at this station, running through the salt meadows to the County Farm, so called, and a part of which is known as Snake Hill. Upon this hill, which is a rocky mound, are a penitentiary and an alms house belonging to the County of Hudson. Dr. Converse, the plaintiff below was the County Physician, and he had been such, previous to the accident for ten years, his custom being to go daily from Jersey City to the County Institution at Snake Hill. The public road was known as the County Road to Snake Hill. There was no travel upon it, except for persons going to and from that place. Speaking generally, the whole of the vast range of meadows through which this road to Snake Hill was built, was unoccupied, except as it had been appropriated for railroad tracks and uses. From Secaucus station towards the east, on the line of the railroad the distance was at least one mile and a half before reaching high land. The County Farm, with Snake Hill, is the only solid ground in the midst of the salt meadows. The map produced by the plaintiff shows the crossing of the railroad tracks and the county

road. There are two main tracks, one the east and the other the west bound, and five tracks besides, two being to the south of the east bound track, and three to the north of the west bound track, making in all seven tracks at the crossing. The scale of the map is ten feet to the inch. The station building is to the north of the west bound track, and is located upon the map. The company kept no regular flagman at the station. The public road was macadamized perhaps from twenty-five to thirty feet in width, although some of the witnesses make it much narrower. There is no fence on either side of the county road. There was formerly a gateway upon this road into the County Farm, after leaving the railroad, with an arch, but these are all gone. There is upon the map what is called a guard-house upon the County Farm.

The plaintiff went over to the County Institutions that evening between six and seven o'clock, and remained there until eight o'clock, when he came away. He was in a ladies phaeton, being a four wheel top buggy, the top being a hood which may be let down or raised up. The horse was not his own which he was accustomed to drive, but one hired by him at a livery stable. He sat in the buggy with a lap robe over him at the time of the accident, the hood being up, that is, standing. The plaintiff, in referring to the accident, states on page 19 of the testimony, that "It occurred at the crossing of the County Road and the Delaware, Lackawanna and Western Railroad, the Boonton Branch. It occurred this way: I was returning to Jersey City from the Penitentiary at Snake Hill. When I reached the limits of the County Farm there was a train just arriving at the crossing. I waited for that train to pass, and saw that it consisted of an engine and three or four cars—I can't state the exact number, some thing like that—and that on the

rear car there were lights. I listened and heard nothing, looked to right and left and saw nothing approaching. I started to cross, and when I reached the east-bound track of the crossing I was struck by cars that were coming along without any engine attached, apparently a detached part of the train that had just preceded." He also said, page 20, that, when hit, he was going at the rate of three or four miles an hour, and that he thinks, page 21, that the train that hit him was not more than ten feet away when he first saw it; that he was on the track when he saw it coming straight upon him to the left. The fact is, that there were twenty-five loaded cars composing the whole train which came in from the westward, and before reaching the public road it was severed at about the center of the train, the locomotive, with the twelve forward cars, running across the road, leaving the remaining thirteen cars to follow, the forward car of that part of the train being within about ninety feet of the other part of the train when crossing. In other words, the space between the two parts of the train at the crossing when the plaintiff was hit was about ninety feet, and the train was making what is called a "running switch" (not a flying switch). In making the running switch, the first section goes on over the switch into the yard, the second stopping at length upon the main track until after the cars of the first section are deposited into the yard, and then such part of the first section as remained attached to the engine couples up with the second section, and the whole proceeds to Hoboken. All the freight trains have a caboose at the end with proper lights. The caboose was at the end of the second section at the time of the accident. Patrick Quinn, a brakeman, at the time the train was cut, stood on the top of the thirteenth car with a lantern lighted. This thirteenth car was the first of

the second section. As that section was coming up to the station, Quinn, with the lantern in his left hand, walked on the center of the roof of the freight car upon which he was, to the rear end of it to put on the brake, and there, for that purpose, stepped down about two feet upon a platform. He took up the slack of the brake-chain, having his lantern in his left hand, and there came a rush of wind and blew the light out, Quinn then not being over the length of two cars, may be three, from the crossing. Quinn says that his attention was drawn to the doctor by hearing a man hello "Hold on there" or "Hey," something of that description, and that he looked ahead and heard the man hello again very loud, and looked over in the direction towards the County Farm House and saw a carriage approaching, and that he hellowed loud "Hold on there," and that the horse's head was about ten feet from the track when he saw the horse's head and the carriage there; that he also saw in the carriage the form of a man and the form of the knees and the blanket on them; that the man did not stop, and that the horse was just trotting. He also says, "The horse went right on, and we struck the carriage by the car I was on." Quinn's evidence, pages 94–97. The cutting of the trains is not always at the same point, although they cut the cars there every night, but at different points, depending upon what is proper in view of the length of the train and where the cars are to be deposited. The man whom Quinn heard call out was John O'Brien, the night yardmaster at Secaucus. He saw the doctor going on a trot about sixty feet from the east-bound track, and called out to him, "Hold on there" or "Look out there" twice. The plaintiff says that he heard the voice, but that it did not appear to be addressed him, and that he did not stop; but he also says, "I did not dare to stop," and further, that he was then trotting slowly.

It is unnecessary in this preliminary statement to give the particulars of the testimony, as the assignments of error are such as to require this to be done in the argument. The plaintiff claims that there were standing to his left upon the two side tracks, as he approached the railroad, some cars which obstructed his vision, so that he was not able to discover the approach of the second section of the train. This is denied by the company, and the testimony is both ways, leaving the fact in dispute. The plaintiff also claimed that he was in the exercise of due care, looking each way, and notwithstanding such care he was unable to discover that the rear part of the train had not passed. This position was disputed in the evidence by the company. The company insisted that there was no carelessness and no negligence on its part in the management of that train at that crossing; that the travel upon the public road was very light, and that neither in law nor in fact was the company bound to have a flagman there, and that the company was in the exercise at that locality, under the circumstances, of proper care. There is much testimony bearing on this question proper for the jury to consider, but upon which the jury was concluded in the charge of the court. The court took the case in hand and charged, as a matter of law under the admitted or uncontradicted facts, that the railroad company was guilty of negligence. On that branch of the case there was no question of fact left for the jury, for the ruling of the court was that there was negligence in law on the part of the defendant. Whether the case, on this branch of it, should have been taken from the jury, and the court assume control over the facts, and charge that the defendant was guilty of negligence, is the leading question in the cause. The most of the exceptions are embraced in this question, but there are questions of the admis-

sibility of evidence which will be dealt with hereafter by themselves, and which can then be better understood than by an attempt to present them in this part of the brief.

ERRORS ASSIGNED.

1. Because the Court took the case from the jury on the question of the defendant's negligence, and charged as a matter of law that the railroad company was guilty of negligence. This is the substance of various assignments of error accompanying the record, namely, Assignments 11, 12, 16, 17, 18, 19 and 20 on pages 128–9. That part of the charge complained of in this respect is as follows:

"Addressing ourselves to the first question, does the evidence show the defendant to have been guilty of negligence? The defendant was at the time engaged in operating or performing what is called a "running or flying switch". Having brought a train of some twenty-five burdened cars from the westward to a point within a short distance of the public road on which the plaintiff was driving, it there severed the train near the centre, and with the twelve forward cars attached to the engine ran across the public road when the plaintiff was approaching the crossing, leaving the remaining thirteen cars to follow by the force of gravity some distance behind, crossing the public road about ninety-feet in the rear and running over the plaintiff and his vehicle, seriously injuring the former and breaking up and destroying the latter. This act of running the train of thirteen cars across the public highway in the manner described by the witnesses, constitute the alleged carelessness complained of by the

plaintiff. Was this act careless—a disregard of the defendant's duty to persons travelling on the public highway? It is the plain duty of all railroad companies employing locomotive engines and trains to approach grade crossings of public highways with great care, to warn travellers upon such highways of their approach, and the consequent necessity of avoiding the railroad tracks. Guards or flagmen must be stationed and kept at such points, or signals by bell or whistle (or other efficient means) must be employed to warn such travellers of approching trains in time to avoid danger. Did the defendant discharge this duty on the occasion referred to? If it did not it was guilty of carelessness. The cars detached, thirteen in number, running a distance of ninety feet in the rear of those which crossed the highway in front of the plaintiff, must be regarded as constituting a train in the sense above referred to. To call them a section of the train in advance, signifies nothing important to the case.

Running thus separately they were just as dangerous to travellers on the highway as if they had never been attached to the train in advance, and there was therefore the same necessity that their approach should be heralded or signalled in some efficient manner.

There was no such heralding or signalling of any description, no guard or flag, no sounding of bell or whistle, and I therefore instruct you that the defendant failed in its duty in this regard, and consequently was guilty of carelessness. The circumstances that there were lights on the rear car, and had been a light on the front car which was blown out a short distance back from the highway, did not relieve the defendant from his obligation to give the ordinary or some other proper warning.

This method of operation "running or flying switches" in the vicinity of and across public highways,

whereby detached portions of trains approach and cross without engines and without signals or warnings, has been severely commented on by the courts, and in several instances pronounced to be a plain disregard of duty to travellers upon such highways.

We have thus found as matters of law from the admitted or uncontroverted facts that the defendant was guilty of carelessness, and will therefore now pass to the second question, "was the plaintiff also guilty of carelessness which contributed to the accident?" Pages 120–1.

Also on page 122— "If you find the plaintiff was guilty of negligence he cannot, as I have before said, recover. If you do not so find (that is do not find him here to have been guilty of negligence) he is entitled to your verdict".

The following requests to charge, with the refusals and instructions of the court thereon, involve and are covered by the same error assigned; Page 118.

The court is asked to charge; first, the rule of responsibility on the part of the company to the plaintiff is ordinary care; that that is the degree as distinguished from the degree of care with reference to passengers; that the rule in this case is the rule of ordinary care. The court answers, that the defendant was bound to the observance of great care; that "ordinary" care in the sense here intended is such care as I have just stated, though it is not that degree of care which is due to passengers on trains.

On page 119. The court is asked to charge: If there was no want of ordinary care on the part of the company in the management of the train in question, there can be no recovery by the plaintiff. The court answers: That it cannot so charge, inasmuch as it finds from the admitted facts of the case that the defendant was guilty of negligence.

Also the court is asked to charge: If the jury believe the evidence of Quinn as to the fact of his having a light at the time of the cutting of the train, and that the same was blown out under the circumstances related by him, and that the injury was occasioned by the want of such light, then the jury would be justifiep in finding that the injury was an inevitable accident, from which no action arises to the plaintiff. The court answers: This point cannot be affirmed; the court cannot so charge.

2. Because the Court allowed the plaintiff to prove that the highway was there before the railroad was constructed. This is found on page 48 of the case.

3. Because the Court refused to allow the company to prove by the witness, O'Brien, that when the plaintiff cro-sed over the railroad tracks in going to Snake Hill that evening, which was between six and seven o'clock, there was a coal train standing on the east bound track with the caboose on the road crossing, and that the doctor, instead of waiting for the caboose to pass, went off towards the west of the road over the railroad tracks where there was no crossing. This is found on pages 80 and 81.

4. Because the Court allowed the plaintiff to ask of the witness Stewart, and the witness to answer, this question: "Q. Mr. Stewart, did Mr. O'Brien tell you that night what speed in his judgment that train that hit the doctor was moving at the time it hit him? A. Yes, he said about sixteen miles an hour positively. Page 117. Stewart came upon the ground about 9.15, more than one hour after the accident had occurred, and after the doctor had left." Page 49.

5. Because the Court refused to charge the jury as requested that "If the jury believe the evidence of Quinn as to the fact of his having a light at the time of the cutting of the train, and that the same was blown out under the circumstances related by him, and that the injury was occasioned by the want of such light, then the jury would be justified in finding that the injury was an inevitable accident from which no action arises to the plaintiff." Quinn's evidence is on page 95, and the same has already been stated.

ARGUMENT.

I.

The facts on the question of the defendant's negligence should have been passed upon by the jury, and not decided or acted upon by the Court, as a matter of law. In no aspect did the law necessarily hold the defendant guilty of negligence.

The breaking of a train, or making what is called a running switch at the crossing of a public road is not, *per se*, negligence.

There is a very great difference between having the Court establish a rule that it is contrary to law to sever a train at the crossing of a public road, and refusing to disturb a verdict where the jury has found, as a fact, that the making of a "running-switch" was careless under certain particular circumstances.

The Court had held, page 47, that the character of the highway was an indifferent question; whether much travelled or little travelled made no difference, and that it must be treated as an ordinary highway, crossing the railroad at grade. The Court at the same time said: "if it was a railroad running across the

streets of a city, that would be a different thing.' Public highways in the contemplation of the law are not always alike. We understand what a public road is, legally speaking, but a road may be public and yet, very little travelled. The degree of travel gives character to public roads and the caution to be used by railroad companies at a crossing, is a relative question depending upon the extent of travel and other circumstances peculiar to the locality. There is some evidence as to the extent of the travel upon this road. The plaintiff swears, page 29, that the road stops at the County buildings and that he frequently met people as he came home from there, who were driving towards Snake Hill and driving to Snake Hill; also that by frequently he meant on an average, about one an evening. This is not a road which is travelled much by strangers, but almost exclusively by those who have business at Snake Hill and who necessarily become familiar with the locality. It is quite clear from the evidence, that, at night, no one travels that road except those connected with the institutions at Snake Hill or some occasional visitor, page 29. In the contemplation of the Court, the amount of travel was of no account and could not be passed upon by the Jury nor regarded by the Court in applying the law. We insist that the care required on the part of the company, depended largely upon the character of the use or travel at the crossing; the whole being relative. It is difficult to find a more secluded spot than Snake Hill; standing out in the midst of thousands of acres, vast tracks of meadow swamp, and all of which has to be filled in before it can be used. Page 49, also pages 48, 18, 28. Secaucus Station with the surrounding railroad yard, was undoubtedly located in the midst of this waste, because of its solitude. The locality is used by the railroad company for the storage of loaded coal and

other freight cars for the time being, and for distribution and delivery upon the railroad at its terminal, on the Hudson River. This is clear from the whole scope of the evidence. Dr. Converse swears, page 23, that the sidetracks were used for coal cars and other cars to stand upon, and he knew that they had sometimes, three or four engines at that point, drilling. Page 29. He also frequently saw trains, freight and coal, coming along about the hour in question and towards New York. The very train in question usually passed at that hour, pages 71, 75, 79, 91. John O'Brien was the Yard-Master and his testimony shows the uses of the yard. He had charge of the switches and determined where the loaded cars should be placed.

The railroad, from Secaucus crossing towards the west, is straight for three miles. The land is also level, for it is all salt meadow. Page 77. Looking towards the west, in the direction from which the train came, there are no hills between the railroad and the solid ground from which the doctor came. The ground rises slightly from the railroad towards the County Farm. The doctor swears to this, page 21, but there is other testimony to the same effect. There can be no question, that there was nothing to obstruct the view of an approaching train to the west of the crossing, in time to avoid danger, unless there were freight cars in sufficient numbers and height to interfere with the plaintiff's sight from his buggy, and therefore, evidence was given by him, and other witnesses on his part, to show the existence of such obstructions. The claim of the plaintiff was that there were freight cars upon the first and second side tracks towards the County Farm, up to the crossing or within a few feet of the same, so as to prevent the plaintiff from seeing the approach of the second part of the train. The evidence of the plaintiff himself is found on pages 21–2. The doctor says, that he saw

the train just arriving at the crossing, and that it consisted of an engine and three or four cars. Page 19. There were actually twelve cars besides the engine in the first part of the train which he saw pass. His vision at best was uncertain. There was evidence on the part of the Company that there were no cars west of the crossing upon the side track towards the County buildings (being the first side track) and on the second side track, that there were no cars for a distance of two hundred feet from the County road, leaving that side track clear back to where it connects with switch No. 1. See the evidence of John O'Brien, the yard master, pages 82–3. His testimony is perfectly distinct upon that subject. Patrick Quinn, the brakeman upon the first car of the second section, made an inspection of the tracks with O'Brien and says that there were no cars upon either track. (Page 100, referring to the same tracks as O'Brien). James Coffey, a watchman of the Company, who was at Secaucus the time of the accident, swears substantially to the same effect on pages 106–7. There was a coal bin, page 105, &c., to which the first side track extended. This is what O'Brien calls a spur. Upon that, there were no cars nor any upon the second track up to switch No. 1, as appears from the evidence of the defendant. The plaintiff produces witnesses who came upon the ground some time after the accident from the County buildings, whose opinions vary as to the existence of cars upon these two tracks. They vary between ten and one hundred feet or more of the crossing, as to the location of cars. These witnesses are: Fallon, pages 42, 44–5. Stewart, 50–3. Mazwell, 54. Brady, 54–6.

Whether there were cars upon the side tracks so as to obstruct the view was a disputed question of fact entirely and which the court could not lawfully decide or assume that the plaintiff's witnesses were right and

those of the defendant wrong. According to the evidence of the defendant, the side tracks next to the County farm were clear, so that the approach of the train could have been seen from where the doctor is said to have stopped, to the south of the tracks, or to put it in another shape, that the defendant had not been guilty of carelessness in obstructing the view of the main tracks by standing cars.

The plaintiff says, when he reached the *limits* of the county farm, there was a train just arriving at the crossing, and that he waited for that train to pass and saw that it consisted of an engine and three or four cars, can't state the exact number, something like that, and on the rear car there were lights; that he listened and heard nothing, looked to right and left and saw nothing approaching; that he started to cross and when he reached the east bound track of the crossing, he was struck by the cars that were coming along without an engine. Page 19. On page 30 the plaintiff says, that the distance was not far from sixty feet from the crossing to the place where he stopped. He also says that he waited there, then looked and saw nothing. The first section had passed. He saw no caboose upon it (the freight lines of the D. L. & W. always have a caboose. O'Brien 75), but saw the last car with four lamps behind. On page 33, upon cross-examination, the Doctor states that where he stopped was about twenty feet to the west of what is indicated on the map by two broken lines: one being at the end of what is marked "path", which was about fifteen yards from the nearest railroad track. Fifteen yards are forty-five feet. From the south rail to the rail of the east bound track according to the map, it is one hundred and five feet, the total therefore, is one hundred and fifty feet from where the doctor stopped to the first rail of the east bound track. He was struck

about the middle of the buggy: the horse escaped with little injury. It must have been at least one hundred and fifty feet from where the doctor stopped, to the first east bound rail. There is no pretence in the case, that the gap at the crossing between the two sections of the train was more than about ninety feet. See charge, page 121. Before reaching the crossing, the gap must necessarily have been less, as it was constantly widening. The plaintiff did not rise from his seat in the buggy at all. Page 39. He says he did not see the light in the Station House. 40. There was a light there. He did not see the second section until too late, and the voice which called out to him "look out" he heard, but did not know it was intended for him. He also says that he was going about three or four miles an hour, page 20, and on a slow trot. 32. The speed of the second part of the train was about ten miles an hour, although according to some of the plaintiff's testimony it was said to be from fifteen to sixteen miles per hour. How he got over one hundred and fifty feet at the rate of three or four miles an hour, while the train was running ninety feet at ten miles an hour, it is difficult to understand, after he saw the rear car of the first section pass with the lights and looked out and saw nothing before going on. The statement of O'Brien on page 72 must have been true when he says, that he heard the doctor coming up the road from the direction of Snake Hill on a trot, and first saw him about sixty feet from the east bound track; then on a trot. He also says that the doctor did not cease the trot before he saw him and that when he saw him he came right on and did not slack up a bit. This is the witness who helloed out twice to the plaintiff. Read pages 72-3. The truth or the accuracy of the doctor's story as to the obstructions to his vision and where the second part of the train and the Doctor were, in their

relation to each other previous to the collision, were questions of fact for the Jury. The assumption by the court as a legal proposition that there was negligence on the part of the defendant, was not only wrong in law, but injured the Company greatly before the Jury on the question of contributory negligence, for that could only be judged of in in its relation to the facts bearing upon the question of carelessness on the part of the company.

The position of the Company was this:—that there was very little travel at night upon this County Road; that there was nothing that then required the Company in the character of the locality, or in the nature of the travel, to keep a gate or flagman at the crossing; at each side of the road crossing, the country was level and to the west of the cros ing so called (it is really about north) the main tracks are straight for a distance of three miles; that there were no cars standing on the sidetracks to obstruct the view for such a distance as would enable a traveller in the exercise of ordinary care to see or hear the ca s and avoid danger; that the cutting of the train that night, was not in itself negligence; that the care required of the company in the act and the management of the two sections was relative, depending upon the locality and the existing circumstances; that the width of the gap at the crossing is not always the same, but depends on the length of the train and where the cars are to be left; that these are business questions upon which the judgment of the railroad is to be reasonably regarded; that on the rear of the first section, was a man with a light and on the first car of the second section also; a man with a light who was on top of the car and as conspicuous as he could be. There was a caboose at the rear of that section with lights at the side (some of them colored) and the rear, which could be easily seen. Page ; that the

extinguishment of the light in the hands of the man upon the front car of the second section was a pure accident of rare occurrence and not to be expected; that the yard-master and the brakeman O'Brien gave all the warning they could; that with no obstructions upon the sidetracks and a level country and scarcely any travel at night at the crossing, and in view of the fact that the Company is responsible only for ordinary care on its part, in the light of ordinary care on the part of the traveller, the court could not as a matter of law, assume that the defendant was guilty of negligence. The facts should have been left to the Jury under proper instructions, so that they might have decided the question of negligence and not the court.

The rule laid down by the Court was that the Company was responsible for *great* care, but not that degree of care which is due to passengers on trains, the Court refusing to charge the rule of ordinary care. If the case had gone to the jury simply upon that instruction, we submit it would have been wrong, because it is misleading and not such a standard as is expected of people o dinarily, but the Court went farther and decided that according to the standard given, the defendant was negligent.

The fact is, the injury to the doctor was extraordinary. How he could have gotten between those two parts of the train, on the basis of the truth or accuracy of his statement, is inconceivable!

If the Court should have said to the Jury as a matter of law, that the company was bound to exercise such care and caution as would prevent such extraordinary occurrences and the Jury should have found against the defendant upon it, that we think would have been error: but when the Court undertakes to say to the Jury, that the defendant was careless, because it did not make such provision as in the opinion of the Court

might prevent such injuries, then the province of the Jury is invaded and these questions of fact, disputed as they may be, become mere matters of judicial judgment. The rulings in this case go beyond any justification I have been able to find in the books. Courts have criticized the making of running switches in populous localities and have refused to set aside verdicts or findings of referees where negligence has been found, but that is very different from the Court taking the case in hand and saying that the making of a running switch under the circumstances of this case, is in itself negligence.

There is no claim on the part of the plantiff that the statute of the State as to signals was not complied with. The bell was rung. Apart from that, the doctor saw the locomotive and the cars at the crossing, one hundred and fifty feet from the east bound track. But the point of the charge is that the defendant was guilty of negligence because the second part of the train was allowed to come up to and cross the highway without sufficient warning in the judgment of the Court. That depended upon facts, within the province of the jury. The uninhabited character of the locality, the insignificance of the travel upon the highway, and whether the view was obstructed by freight cars or not, were all important elements on the question of negligence, and for the consideration of the jury. The fact of the presence of Quinn upon the top of the car with his light, and the accident of its going out, were also a proper matter for the jury. In this connection I refer to the case of Telfer vs. Northern R. R. Co., 1 Vroom 189, (the opinion of the Chief Justice). We insist that with an unobstructed view as sworn to by the defendant's witnesses, and the taking into consideration the locality and the travel upon the road, and at night too after the day was over, that there was no legal require-

ment of the company to have a flagman at the crossing, or to exercise any greater caution than was then adopted by the company, and that whatever question exists with reference to it, is one of fact and not of law. Nothing more can be claimed by the plaintiff than that the company were bound to operate their trains with the care and caution called for by the peculiar circumstances.

60 N. Y., 136; Culhane *vs.* N. Y. Cen. & H. R. R. R. Co.

This case is also instructive, as showing the effect of an error of law as to the defendant's negligence in its relation to the question of the plaintiff's contributory negligence. In the case before us, there was so much relation of fact to fact, both as to the plaintiff and the Company, that the carelessness of the defendant and the plaintiff, could not be dealt with separately, the one as a question of law and the other as of fact. The facts were so interwoven and so closely connected that a charge to find negligence on the part of the defendant from the facts would necessarily mislead and unfairly embarass the jury in determining whether there was contributory carelessness or not on the part of the plaintiff.

In order that the facts may be fully understood, I will also state that in and about the caboose there were from seven to nine lights, among them one on top of the caboose; also side lights which could be seen by the engineer; See page 98, Quinn. See also evidence of O'Brien, page 76.

I call attention also to the testimony of O'Brien as to his calling out, on pages 72–3. The doctor heard him. but failed to apprehend that it was intended for him, The character of this warning was also a fact for the

jury. See also pages 87-8. The charge of the Court that the defendant was negligent, also so swallowed up the evidence of Quinn as to the fact of his having a light at the time of the cutting of the train and the blowing out of the light, that the jury was thereby absolutely excluded from considering it as an inevitable accident, and thereby relieving the defendant from negligence provided the injury was occasioned by the want of such light.

II.

We submit that there was error also in the court allowing the plaintiff to prove that the highway was there before the railroad was constructed. See page 48 of the case. Why should that fact have been injected into the jury box? It naturally would do mischief to the defendant, and to the plain mind might create the impression that the highway had rights superior to the railroad company at the crossing, when the contrary is the case.

See Telfer *vs.* Northern R. R. Co., Supra.

Such a thought would easily mislead the jury, especially such a jury as that, which found so extravagant a verdict.

III.

The refusal of the court to allow the company to prove by the witness O'Brien, that when the plaintiff crossed over the railroad tracks in going to Snake Hill that evening between six and seven o'clock, there was a coal train standing on the east bound track with the caboose on the road crossing, and that instead of waiting for the caboose to pass went off the highway towards the west and over the tracks, where there was

no crossing, was erroneous. This refusal is on pages 80 and 81. The idea of the court seems to have been that it was proving a fact disconnected with the occurrence at the immediate time of the accident. We insist that it was virtually a part of the *res gestae*, and so connected with the scope of the case as to show the recklessness of the doctor at that time. Less than two hours probably elapsed between crossing the railroad on his way to Snake Hill, and recrossing it on his return. Why was not the fact material, and why should the jury not have had it? The particulars should have been gone into. Did the doctor purposely do that, or did his horse shy? We proposed to show the fact, and the particulars would have followed.

IV.

It was also erroneous, we think, for the Court to permit the plaintiff to ask of the witness, Stewart, and the witness to answer, as follows:

"Q. Mr. Stewart, did Mr. O'Brien tell you that "night what speed, in his judgment, that train that hit "the Doctor was moving at the time it hit him?"

"A. Yes, he said about sixteen miles an hour posi- "tively." Page 117.

It was over one hour after the accident that Stewart came upon the ground. The plaintiff had left. Page 49. This evidence was hearsay.

V.

Quinn, on page 95, relates the fact of his having a light at the time of the cutting of the train, and the circumstances under which the same was blown out. The point of the request to charge in this

respect was this; (see request). If the jury found that the injury was occasioned by the want of such light, and believed his testimony as to the circumstances under which the same was blown out, that then they could justify themselves in finding that the injury was caused by an inevitable accident from which no action arose to the plaintiff. It is perhaps unnecessary to make this as a distinctive point, because a refusal to charge as requested, necessarily follows from the fact that the Court charged that the defendant was guilty of negligence; but the force of the request is the better seen by presenting it in this distinct way.

We respectfully ask that the judgment be reversed.

March 2, 1891.

J. D. BEDLE,
Counsel for Plaintiff in Error.

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SUPREME COURT

—OF THE—

UNITED STATES.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Pltffs. in Error,

vs.

CHARLES B. CONVERSE,
Deft. in Error.

In Error to the Circuit of the United States for the District of New Jersey.

No. 228.

October Term 1890

BRIEF OF

JAMES B. VREDENBURGH,

Counsel for Defendant in Error.

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Pltffs. in Error,

vs.

CHARLES B. CONVERSE,
Deft. in Error.

In Error to the Circuit of the United States for the District of New Jersey. No. 228 October Term, 1890.

BRIEF OF VREDENBURGH & GARRETSON, COUNSEL FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Defendant in Error controverting the statement of the case of plaintiffs in error, makes the following statement of the case.

After dark on the evening of March 13, 1886, a train of thirteen cars of the plaintiffs in error without a locomotive, without a headlight or other light, without any warning of its approach, ran across a public highway, striking a carriage thereon in which Dr. Converse the defendant in error was sitting, severely injuring him.

To recover compensation for the injury thereby received, this suit was brought.

When so struck, the Doctor was driving a horse to a four wheel buggy, with a top or hood, of which he was the only occupant.

He was driving from west to east on a mecadamised public road leading from the County Institutions of Hudson County to Jersey City.

The collision occured at 8.10 P. M. the sun set that night at 6.04 o'clock, the moon, rising at 12.55 P. M. and being in its first quarter, and obscured by clouds.

The tracks, at the place where the Doctor was injured are laid across this County road at grade about at right angles, and consists of two main tracks and five side tracks; of these tracks the three most westerly are side tracks the fourth track is the east bound track; the fifth track is the west bound track; and then still easterly are two more side tracks.

There were no gates, lights or flagman at this crossing.

The train which ran into the doctor consisted of twelve box freight cars and a caboose making thirteen in all.

It ran across this public road in the darkness of the evening at a speed of ten miles an hour, without giving any warning of its approach. It sounded no whistle, rang no bell, showed no light. No one was on its forward end to notify travellers on the public road.

Within a short interval of time before the collision

it had formed the rear part of a train of twenty-five cars, which had approached this crossing from the north.

This train had been cut in two intentionally, for the purpose of allowing the rear part of the train to be stopped before reaching some switches some distance south of the crossing.

It was following on the same track, at some distance in the rear of the fore part of the train of twelve cars.

On the rear end of the last car of this preceeding train or section there were three or four lights.

Converse pages 30 and 31
Quin pages and 97, 98 and 101.

On the train hitting the doctor there was no light, except in the caboose (thirteen cars away). Quin, the only brakeman out of the caboose on that train, had had a lantern which he placed on the platform on the *rear end* of the first car before reaching the crossing. This platform was two feet below the roof of the car, (Quin, pages 99 and 103) and while there the wind blew it out before reaching the crossing.

The distance between the two sections was uncertain, but it was at least ninety (90) feet.

This public road was mecademised for a width of from twenty-five or thirty feet. It led to the County Farm, Insane Asylum, Penitentiary and Alms House; the witness of Plaintiff's in Error, Mr. O'Brien, says that "about a half dozen wagons passed across the crossing of a

night, take it on an average the year round," page 79. The court stated that it appeared to be a public highway, but offered to permit counsel to show if it was in any way extraordinary in the use or absence of use. Page 49.

When the doctor approached this crossing and at a proper distance from it, he stopped, looked for and listened for approaching trains. His view as to the moving trains was by reason of the darkness and cars on the side track imperfect; the preceding engine and train prevented his hearing the approaching train; the fact that a train had just passed was calculated to and did, he swears, lead him to conclude that that track at least was safe.

He was justified in believing that some notice, some warning of a train which was about to cross the crossing, would be given the traveller on the highway.

No such warning was given him.

ARGUMENT.

1. Was the Court justified in charging the jury that "from the admitted or uncontroverted facts the defendants (plaintiffs in error) were guilty of carelessness."

In Schofield v. Chicago R. R. Co., 114 U. S. p. 618. this Court says "It is a settled law of this Court "that where the evidence given at the trial with all "the influences which the jury could justifiably draw "from it, is insufficient to support a verdict for the "plaintiff so that such a verdict if returnable must

"be set aside, this Court is not bound to submit the "case to the jury, but may direct a verdict for the "defendant."

And to this effect are the many cases cited in that opinion on page 619.

The above case, and many of the cases cited, it is true, are in favor of the defendant, but some of them are in favor of the plaintiff and the law is settled in both respects the same; as is said in Anderson County Commissioners vs. Beal, 113 U. S. p. 241.

"But where the question after all the evidence is "in, is one entirely of law, a verdict may at the trial "be directed for the plaintiff, and when the bill of "exceptions, as here set forth, all the evidence in the "case, this Court, if concurring with the Court below "with its views on the questions of law presented by "the bill of exceptions and the record, will affirm "the judgment."

In Bevans vs. United States, 13 Wall. 56. Verdict for the plaintiff directed by Justice Strong was sustained.

In Walbrun vs. Babbitt, 16 Wall. 577, a like direction by Justice Davis was sustained; in that case this Court says, "Indeed the verdict was so obviously "right that the Court would not set aside the judg- "ment when the record shows that no other result "could be obtained on a new trial."

In Hindrick vs. Lindsay, 93 U. S p. 143, a verdict directed by the justice was affirmed by this Court.

In Arthur vs. Morgan, 112 U. S. 495, a similar direction was sustained by this Court.

This is also the rule in the State of New Jersey.

In Baldwin v Shannon, 14 Vroom, p. 603, the Court says "the power of a judge to order a non-suit or direct a verdict does not depend upon the absence of all testimony in opposition to the case in favor of which

the ruling is made but the test is whether there is any testimony from which the jury can reasonably conclude that the fact sought to be proven are established."

In Lehigh Valley R. Co. v. Greene, 4 Central Reef, 901, the Court says.

"Where the facts and the inferences therefrom are "undisputed. Where the precise measure of duty is "determinate the same under all circumstances, when "a rule of duty in a given exigency may be certified "and accurately defended the question is for the "Court, and not for the jury," citing cases.

The Court found as uncontroverted facts that the plaintiffs in error caused thirteen cars, to which no locomotive was attached, to run across a public highway, at a speed of ten miles an hour, without giving any warning of its intention so to do.

The witness produced by the plaintiffs in error, on their own examination proves the truth of these facts.

They prove, that there were no gates at this crossing, no flagman, or other employee to warn travellers, nor any devise of any kind to give notice of the approaching cars.

They prove that no whistle was blown, or bell rung.

They prove that it occurred in the darkness of a cloudy night, and so the moving cars could not be seen by the traveller.

They prove there were no lights in the front on the foremost car to be seen. Nor any person upon it whose duty it was to voice the danger, or who did warn the Doctor of the approach of these cars.

They prove that the warning which might have come to the ears of the traveller from the movement of these cars, was prevented by the noise of the train which immediately proceeded it.

Why was not a brakeman on the front of the approaching train to warn by voice and light the traveller on the highway?

Rover on railroads vol. 1, page 492.

There were only two brakemen on the thirteen cars, one of whom, Quin, was at the rear of the first car pulling up the slack of the train; the other brakeman was in the caboose in the rear of the train, pages 95, 99 and 103.

The only light on this train outside of the caboose was a hand lantern in the hand of this same Quin.

This lantern was placed on a platform about two feet below the roof of the car five inches wide and two feet long between the first and second cars, page 95. Quinn on page 99, testifies in answer to the question "How did your light happen to be out?" said "It was very windy that night when I went over the "roof of the car and I put it down between those "cars and there was a rush of wind and I do not "know what caused it hardly but the wind came up "there." By the Court, "That blew the light out? "A. "That blew the light out."

In such a position the light gave no warning to the traveller that the intention was to run the cars over the highway.

Was it not negligence not to have the light and the brakeman at the front end of the train as it approached the highway?

The testimony of Quin, the person in charge of there cars, pages 99 to 101, clearly shows that he did not take any means whatever to warn travellers on the highway of the approach of these cars. He clearly thought there was no duty upon him in that direction.

None of the employees of the company seem to realize that there was a duty on the company's part

towards the traveller on the highways. These cars were run over that public road crossing as if there were no crossing there, and as if the traveller on such crossing was a trespasser to whom the company owed no duty.

Quin was not there for the purpose of warning the traveller, nor was his light there for any such purpose. He was there merely to break the trains and his lantern was only to assist him to accomplish that, and he carried and used it only to that end.

The Court held that it was the duty of the plaintiff in error to give some warning to the traveller under such circumstances of the intention to run these cars across the highway.

That it is the duty of railroad companies to give the warnings required by Statute, or in the exercise of reasonable care is fundamental.

Pierce page 342 and cases there cited.

In addition to the cases cited by the Court in its opinion as to negligence of company in making running or flying switches on public highways we refer to,

Beach on Contributory Neg. p. 223.
Paterson Railway Act Law, p. 166.
Thompson Negligence, vol. 1, p. 143.
Rover on Railroads, vol. 1, p. 491.
French v. Taunton Branch R., 116 Mass. p. 539.

The last case in some respects similar to the present one. Judge Endicott says, "of the negligence of the defendant there can be no question."

We insist that the Judge was clearly right in his facts and in the law resulting therefrom.

That this Court must arrive at the same conclusion he did.

That submitting it to a jury would result in the same verdict necessarily.

II.

The question to Stewart. "Q. Mr. Stewart, did Mr. O'Brien tell you that night what speed in his judgement that train that hit the Doctor was moving at the time it hit him?" page 117 was not asked to prove the rate at which the train was running, but to contradict the evidence of O'Brien on page 75, that the train was moving about ten miles an hour, and so attack his credibility. The same question was asked Brady page 117, 118, and answered without objection being made.

III.

The offer of the company to prove by O'Brien that when the plaintiff crossed over the tracks, an hour and a half or two hours before the accident, on his way to Snake Hill, he drove outside of the crossing to get around a standing train, was properly excluded. Proof that finding an obstacle in his direct road he had avoided it by driving around it certainly would not have proved recklessness at that time, much less when driving two hours later over the same crossing in the middle of the road when he saw no obstacle. It was no part of the *res gestae*. It was a separate independent matter with no possible connection